

FORUMS AND METHODS OF DISPUTE SETTLEMENT

IN LESOTHO:

**A FRESH LOOK AT THE DEPICTIONS OF
THE JUDICIAL SYSTEM**

**Itumeleng Kimane
PhD Thesis,
University of Edinburgh
1989.**



ABSTRACT OF THESIS (Regulation 7.9)

Name of Candidate ITUMELENG KIMANE

Address

Degree Ph.D. Date 10 January, 1989.

Title of Thesis Forums and Methods of Dispute Settlement in Lesotho :
..... A Fresh Look at the Depictions of the Judicial System.

No. of words in the main text of Thesis approximately 110,000 words.

The thesis is a study of forums and methods of dispute settlement in contemporary Lesotho. Using a combination of research techniques, it explores how historical experience has led to the prevailing complex system, and to the coexistence of institutions and dispute settlement processes of different cultural, ideological and philosophical origins. These include the "unofficial" chiefs' courts – remnants of the precolonial indigenous system – which are largely inquisitorial in character, and the official courts – consisting of the customary courts and the received law courts – which are based, in theory, on the western adversarial model, although this is less evident in practice especially in the customary courts.

From the above, it is argued that the processes of dispute settlement in Lesotho represent a legal pluralistic form more than a dualistic, parallel or adversarial system as depicted in the existing literature. The thesis is able to illustrate this because it goes beyond simple descriptions of the constitutional characteristics of existing dispute settlement processes, and looks at what goes on at the practical level. The research, for instance, demonstrates that despite the 1938 Proclamations, the "unofficial" courts continue to exist and handle a variety of disputes at village level. More than that it shows that the "unofficial" courts and the customary courts operate as a continuum of each other, and that strong symbiotic relationships have developed between the two, in which the rules of procedure and evidence in the former; have infiltrated the conduct of proceedings in the latter. Adding the subordinate – superordinate relationships between the customary courts and the received law courts, the picture that emerges is one of a complex system with more than two parallel layers, instead practices from the component structures interpermeate in a highly complex process of interaction.

In addition, the thesis demonstrates numerous constraints which render the application of the adversarial principles difficult. Practices found to be prevalent in the official courts, have more to do with a combination of factors and circumstances produced by the coexistence of dispute settlement processes and clashing cultural expectations in a plural legal system, than with manipulative practices resulting from organisational demands for discipline and order or informal rules of those who operate the system, which have been used to explain the inadequacies of the adversarial model in the western world. In the customary courts, the model is operated by unqualified personnel whom in addition to their lack of knowledge of adversarial principles, are more familiar with procedure used in the "unofficial" courts and thus bring it to bear in the customary courts. In the received law courts the constraints include shortages of legal practitioners, few experienced lawyers due to insufficient established firms, inadequate provisions for legal representation and legal aid, unqualified prosecutors in the Magistrates Courts, the use of a foreign language (English) and so on. In practice, the adversarial principles are redefined in the context of these obstacles producing a new form of dispute settlement.

DEDICATION

I dedicate this thesis to my parents, Samuel Sello Kimane and Elizabeth 'M'aitumeleng Kimane.

DECLARATION

I the undersigned declare that this thesis has been composed by me and is a record of my work. No part of it has been submitted for publication or for another degree at this or any other University.

ACKNOWLEDGEMENTS

I wish to acknowledge and express sincere gratitude for the assistance granted by the following:

The Ministry of Justice in Lesotho for granting permission to conduct the research in the official courts; the Acting Chief Justice Kheola and the staff of the High Court of Lesotho, The Chief Magistrate Matete, and later Mr. Mapetla, and all the Magistrates, the Judicial Commissioners, and all the Magistrates, the Judicial Commissioners, and the staff of the Central and Local Courts for their cooperation, guidance, for allowing me to observe proceedings in their courts and for many hours spent in discussions with me;

The Attorney General and the Director of Public Prosecutions for their support and encouragement and for making it possible to hold interviews with them and their staff;

Mr. Ramolefe, Training Officer in the Ministry of Justice;
The staff of the Department of Prisons in Maseru for allowing me to interview some of the inmates;

The Chief Legal Aid Counsel;

Professor McClain, Ms. Surtie and Mr. Maema of the Faculty of Law, University of Lesotho who allowed me to sit-in at their lectures on Civil and Criminal Procedure and Evidence;

Mr. George Bereng and Dr. Mosebi Damane for all the historical knowledge they provided;

My brother Kamohelo Kimane for his financial contribution towards the travel expenses for the research;

Nthabiseng Motjoloane who kindly assisted with the transcription of the tape-recorded fieldnotes;

Mr. Letjoi Liphoto for his patience and kindness for driving me around;

Not least, my supervisors Dr. Young and Dr. Griffiths who read through my drafts and provided all the support and encouragement;

Mrs. May Gibb for typing this work;

I sincerely thank the following institutions for their financial support;

The Association of Commonwealth Universities for financing my studies and stay in Scotland;

The Institute of Southern African studies and the Research, Publications and Conferences Committee both at the University of Lesotho;

The Institute of Societal Organisation (Swedish Management Group in Lesotho) who unknowingly assisted me so much by letting me participate in the Management Development Programme.

TABLE OF CONTENTS

	<u>Page</u>
GENERAL INTRODUCTION	1
CHAPTER 1: THE METHODOLOGY AND OUTLINE OF SOURCES OF INFORMATION	19
1. LITERATURE REVIEW	22
a) Literature on Historical Background	22
b) Literature from Other parts of Africa	24
c) Literature on Legal pluralism	25
d) Review of Literature from other parts of the world	27
e) Other pertinent Literature	28
2. FIELDWORK	
ACCESS: Requesting Permission to carry-out the study	33
ACCESS: Negotiating Acceptance and Maintaining Good Rapport	41
Court-room Observations	48
Interviews	54
Unplanned Fieldwork Activities	61
a) Classroom Observations	62
b) The Students Disciplinary Committee	65
c) The "Street Law Project"	67
Problems Encountered	69
Conclusion	70
CHAPTER 2: THE HISTORY AND DEVELOPMENT OF THE PRESENT JUDICIAL SYSTEM IN LESOTHO	73
Lesotho Under British Rule (1868-1870)	75
Lesotho Under Annexation (1871-1880)	84
The War of Guns (1880-1881)	93
Lesotho's Disannexation from the Cape and the beginning of Proclamations	97
The Formation of the National Council and the Events up to 1935	105
The 1938 Reforms and Events that followed	125
Summary	133

TABLE OF CONTENTS, continued

	<u>Page</u>
CHAPTER 3: THE "UNOFFICIAL" COURTS: THE INDIGENOUS FRAMEWORK FOR DISPUTE SETTLEMENT AMONG BASOTHO	141
The Existence of the "Unofficial" Court Structures and the Role of Chiefs in Dispute Settlement	147
The Hierarchy of the "Unofficial" Courts	157
"Banna ba Lekhotla" Men of the Court: The Chief and his assistants.	163
Jurisdiction	170
Procedure	180
Evidence	193
Are the Chief's Courts Really "Unofficial"?	200
Conclusion	210
CHAPTER 4: THE OFFICIAL COURTS I : THE CUSTOMARY COURTS STRUCTURE	215
The Emergence of the Official Customary Courts	217
The Customary Courts at Present: Organisation, Structure and Jurisdiction	235
The Judicial Commissioners' Court	237
The Central and Local Courts	244
Procedure, Evidence, and Practice in the Customary Courts	255
Conclusion	291
CHAPTER 5: THE OFFICIAL COURTS II : THE RECEIVED LAW COURTS	298
The Received Law Courts: Structure and Jurisdiction	300
The Magistrates Courts: The origins of the magistracy	303
The Magistrates Courts at Present	307
The High Court	317
The Court of Appeal	326
The Received Law Courts and Emphasis on Rules	328
The Received Law Courts and their Relation to the Accusatorial System	334
How the Received Law Courts Operate	343
Use of English in the Received Law Courts	370
Delays	374
Conclusion	377

TABLE OF CONTENTS, continued

	<u>Page</u>
CHAPTER 6: THE COURTS AND LEGAL REPRESENTATION	382
Provisions for Legal Representation	389
Legal Aid in Lesotho	404
Legal Counsels in Practice	413
Conclusion	443
CHAPTER 7: CONCLUSIONS	447
LIST OF APPENDICES	
Appendix A : Footnotes	466
Appendix B : Schedule of Central and Local Courts	495
Appendix C : Field Activities	499
Appendix D : Codes of Courtroom Observations	501
Appendix E : Position of Magistrates in Office	503
Appendix F : List of Key Informants	504
Appendix G : Guideline Interview Schedules	506
Appendix H : Statistics of cases filed and disposed of by the High Court: 1985/86	519
Appendix I : Legal Aid Figures 1984/85	520
Appendix J : Official Documents	521
BIBLIOGRAPHY	523

GENERAL INTRODUCTION

As I grew up in the village of Hlokoa-le-Monate, Mapoteng,¹ I remember one day a neighbour suggesting to my mother that, since one of the peach trees in our yard was hindering some of the plants in her vegetable garden from growing, they should share the produce from that tree. As similar demands persisted, my mother one day discussed the matter with a man who was passing next to our house. Then she was told that if this continued she should take the matter to "moreneng" (chief's court) and sue the woman. On enquiring who the man was I was informed he was one of "Mahlahana a morena" the chief's assistants.² There were several of these assistants in the village, one of them was my grandfather. I knew that they used to take part in the allocation of land, as they were present when my parents were allocated the site on which we were living. But then I heard that they also assisted in resolving disputes among villagers. Not only that, my grandfather was a regular attendant at the "Treasury Court" ("teraishareng") and was close to some of the presidents "baokameli" who used to come and work there.³

On yet another occasion the same neighbour claimed that the peach trees behind our house belonged to her and insinuated that she would take the matter to "moreneng". Later, rumour went around that the woman had written a letter to the Prime Minister's Offices, that the site on

which we were living actually belonged to her family and had unjustly been taken from their possession. Comments from some of the people indicated that she should instead have taken the matter to the chief's court. As time went on, similar demands intensified to include at one time claims that fence posts had been shifted into her yard, and at another that a pig reared by my mother had destroyed some of the crops in her garden. Similar claims are very common and frequent in the villages, for instance there would be other accusations where people would be taken to the chief's court such as instances where children have stolen peaches, or where there have been quarrels and fights between women, boys and so on, or where herdboys have stolen mealies from the fields. In some cases these ended up merely as threats without anyone actually taken to the chief's courts.⁴

In yet other instances, the people concerned would simply be ignored and their actions not taken seriously. For example, there used to be a man who would use abusive language, arguing that the site belonging to my parents belonged to his family.⁵ Many times people in the village told my parents that the man was sick mentally - he is mad, they would say - others suggesting that it would be a waste of time even to take him to the chief's court. The situations spelt out above appear to be connected to ideas about unilateral responses towards disputes (Felstiner, 1974; Hirschman, 1970) as indicated in Galanter (1981), that many disputes both civil and criminal are resolved by

either resignation, lumping it, or self-help. Merry (1979) speaks of the employment of exit and avoidance in dispute processes.

On another occasion, a daughter of one of our neighbours was sent to the well (spring) to fetch water, and she was stabbed with a knife by one woman of her age in the neighbourhood. In this event abusive language was used and this involved the mothers of the two women. Later the matter was taken to court and as the people who had attended the proceedings came home, there was a lot of ululation, and I thought it signalled joy and that the matter was over. However, long after this, I learnt that the same matter was being heard, this time before the "teraishareng" ("Treasury Court") and there was talk that this time the issue concerned the stabbing, as the chief's court had only dealt with the use of abusive language in the village by the women and relatives.⁶ What I could not understand is how one case could be put before different authorities, why one of them could not deal with both issues together.

Another day I was with my mother and grandmother. We had been to the hospital to see one relative who had been ill for some time. As we approached home, some men suddenly emerged running from the direction of the village, and ululation⁷ could be heard from the point where these men were coming. When they got onto the main road it became obvious that they were actually engaged in a fight using their "melamu" thick sticks. One of them got badly injured

with bruises all over his head. By then people had gathered around and from the discussions that went on, I learnt that the men had been to the "teraishareng" for a case and that one party was displeased with the judgement⁸ that was given, and that this had been the cause of the fight.

Also there used to be herdboys from the mountain graze-lands "motebo", who would pass on the main road driven by policemen on horseback. In many cases these boys would be carrying skins of animals - sheep, goats or cattle - or their carcasses. In other instances it would be a pot containing meat. As they passed groups of people who would be gathered on the sides of the road to watch, they would be made to tell what they had done. For instance they would be reciting that they have stolen somebody's animal, usually they would mentioned the owner's name and home village, and proclaim that they are thieves, until they reached the police station. This kind of cases, instead of being heard by the Treasury Court in Mapoteng were commonly taken to Ha Motjoka.⁹ I used to wonder why this was so, how come and why it was, that different sorts of cases were taken to different courts.

The cases heard by the chief would sometimes, later on, proceed to Bela-Bela to be heard by Chief Makhabane.¹⁰ On the other hand, those heard in the "Treasury Court" would first proceed to Ha Motjoka¹¹ and then later to Teyateyaneng,¹² though this was only in a selection of

cases. People often mentioned having taken "boipiletso" appeal to Ha Motjoka or to Teyateyaneng, but all these could not make sense to me. What I could not figure out was why some people chose to go to Bela-Bela while others went to Ha Motjoka and so on, and what influenced their course of action in each case.

In addition, there were people called "baokameli" presidents, who unlike chiefs, would come to work in the "Treasury Court". From the way they were treated by the villagers, I could gather they were people of some importance. Different ones would come into the village, work for some time, then leave only to be replaced by others - transfer they called it. The presidents had "bangoli" court clerks with whom they worked. At another time the president of the "Treasury Court" in Mapoteng was a chief¹³ from one of the neighbouring villages. What puzzled me was how he could be a president of the "Treasury Court" and a chief at the same time, more so because there was a chief in the village yet he was not a court president but only operated at "moreneng". This particular president was afforded even greater respect by the villagers and unlike the others before him was always addressed as "Morena" meaning Chief, and not as "mookameli" president. To some extent I came to think there were now two chiefs in Mapoteng.

At another time one of my sisters had a fight with another woman and got bitten on the cheek. The case was

put before the Magistrates Court in Teyateyaneng. One of the key witnesses on my sister's side happened to be a Magistrate in the same court. First, the Magistrate could not hear the matter, but further she could not give evidence in the case.¹⁴ This seemed a puzzle to me - the magistrate was a very close friend of my sister and yet she declined to hear the matter in which she had witnessed the event where my sister got hurt. I could not believe it, nor could I understand why she could not.

Somewhere in the 1960's some people from the Mapoteng area were arrested, they were suspects in a ritual murder "liretlo" case, and I was told they were taken to Maseru as the case was to be heard in the High Court. During the 1970's following the state of emergency, attempts were made to take-over several police stations in the Northern parts of the country. These incidences led to the arrest of some men in the villages constituting Mapoteng. Again I heard they were to appear before the High Court - High treason they called it.¹⁵ By this time I had also come to know that there were people called "bachochisi" prosecutors and "liakhente" defence counsels, and that the latter could speak for people charged with any offence. But these people did not appear at the "teraishareng" ("Treasury Court"), at least I had never heard anyone saying they were present in my village for court proceedings. However, it seemed they appeared in some courts,¹⁶ though the reasons for this were all not that clear to me.

Some of the children I grew up with and those I went to school with from various villages, districts and so on, used to talk about their experiences similar to those I observed in my village. They would be conversing, for example, about neighbours, relatives having been sued in various courts and the rest. Some of the children would on occasion miss school because they were witnesses in some of the cases, often these would be boys who from time to time had to look after animals,¹⁷ however, this was not a common phenomenon. What I came to realize is that the experiences I summed up at the beginning were not unique to my own village, but were constant occurrences in other villages as well.

All the above appeared to be a very complex jig-saw puzzle. The interest of this thesis is to unravel and reflect upon the issues and questions¹⁸ raised in the foregoing descriptions. It is an endeavour to explain various methods and forums of dispute settlement available in Lesotho today. It seeks to look at the various legal mechanisms available, to explain their origin, their characteristics and how in practice they work together. The questions examined in this thesis fall within the scope of issues addressed within the field of legal pluralism which mainly relates to relationships between legal systems of different origins.¹⁹ Legal pluralism encompasses a variety of topics including as summed up by Allott and Woodman (1985) the content of Contemporary laws, their

emergence, their effects in terms of social control functions and otherwise, their change over time and relations to other social facts, interaction between different laws and so on. In this context, I examine forums and methods of dispute settlement including not only their emergence and constitutional character - culturally, ideologically and philosophically - as normative self-regulative (Galanter (1985); Moore (1973)) parts of the overall dispute settlement, but also their relations and interaction with each other and how they function in relation to social facts in the environment within which they exist.

One of the major arguments is that what happens at the practical level is different from the theoretical speculations that have been made about the judicial processes in Lesotho today. One example is evident in the fact that there are officially recognised courts, whose functions are supplemented to a large extent by what goes on in the "unofficial" Courts. In the existing literature, it is only the officially recognised courts that are given extensive consideration, the emphasis being placed on the dualism and parallelism of the Customary Courts and the received law courts. No attention is paid to the "unofficial" courts which, I shall argue, function as part of the overall judicial system. This leads to tensions and ambiguities in the literature because, while some of the studies recognise the existence of the "unofficial" courts

structure, there has been reluctance to accept that they are integral to the smooth working of the system as a whole. The explanation for this lack of attention and the resulting ambiguities, lies mainly in the emphasis placed on constitutional theory, as against what happens in practical reality.

This explicates the notion of Galanter (1981) about "legal centralism" with its focus upon remedies that operate under the auspices of the states, which he claims is not uncommon among legal professionals, and that the mainstream of legal scholarship has also tended to look from within the official legal order. According to Griffiths (1979) the tendency to describe all legal phenomena in relation to the state is essentially arbitrary because "the state has no more empirical claim to being the centre of the universe of legal phenomena than any other element of that whole system does ..." (p.48).²⁰ The existence of the "unofficial" courts in addition to the official courts (ch. 4 and 5) brings up questions about the adequacy of the legal centralist model in this case. Thus asserting what Allott and Woodman (1985) state as the non-monopoly of state law over the legal arena.

The thesis starts off by describing the pre-colonial methods of dispute settlement amongst the Basotho.²¹ These were organised in a fluid and decentralised manner, with the various levels of operation enjoying independence from superior authorities both in civil and criminal matters.

The system operated at the community or village level under the authority of headmen, at regional level the chiefs acted as authorities. Both headmen and chiefs had panels of assistants. At the national level, however, were the sovereignty and council as ultimate authorities. The chieftainship played a variety of roles including the exercise of what today would be recognised as administrative and judicial powers without any distinction. Within this structure family heads and elders of various lineages played an important role in cases involving criminal behaviour and civil matters including abduction, trespass by animals on fields or reserved pastures, inheritance of property, land allocation, thefts, assaults, ill-treatment of children and women, and in all other cases, involving inter-familial and extra-familial relationships. The emphasis was upon the restoration of relationships between parties as members of families and the community.

The chiefs' courts had higher status, co-ordinating activities of the headmen and handling appeals from their courts and other matters like theft, arson, murder, serious assaults and so on. With its supreme authority, the King's court dealt with appeal cases from the chiefs' courts, disputes among chiefs, inheritance in the chieftainship families and other civil and criminal matters. Within this system importance was attached to the involvement of the people - villagers and community members - in dispute settlement processes, whereby they were given opportunity

to participate in the deliberations of important issues involved in cases and in giving necessary advice.

A further characteristic of the indigenous system was its emphasis upon social justice, with stress being placed primarily on peace-keeping and social harmony, the intention being to promote reconciliation and to integrate members into society. All individuals were seen to have the duty to correct one another's "deviant" behaviour within the community. The principle of social justice within the community further manifests itself in the concept that an individual is seen as a part of a social unit. There are no sharp distinctions, if any, between the private and the public, between civil wrongs and criminal offences, between politics, justice and administration, between political issues, legal issues and moral issues. Little emphasis is placed on the abstract formal criteria of justice. These features are evident, for example, in Duncan (1960); Maema (1985); and Mokoma (1984/85) who point out that no strict technical distinction was made between the civil and criminal matters under the indigenous system of dispute settlement among the Basotho, civil proceedings always being incidental to criminal proceedings, with a case dealt with generally as a breach of law. Many of the characteristics spelt out here, it is argued in this work, persist in the "unofficial" chiefs' courts and some have infiltrated the nature of proceedings and practices in the customary courts as well.

The thesis contends that during the colonial times, this indigenous system came under attack leading in the end to the introduction of a different system ideologically, philosophically and administratively. First, this involved a shift towards principles of "legal justice" (Rawls, 1971; Miller, 1976) which equals the justice of the "judge", imposing punishment and making orders for compensation to be paid, including the idea that men are to be treated equally and impartially (Kamenka, 1979). But more than this the introduced system represented a shift toward the accusatorial model originating from the western world. This is evident from the personnel brought into man the new courts, the rules of procedure and evidence and so on. In the customary courts for instance, the presiding officers came to be appointed as "judges" called presidents, assisted in their duties by clerks of the court and messengers. They were to deal strictly with cases involving the customary law and a limited number of statutory laws as would from time to time be determined. Their criminal and civil jurisdiction was limited and spelt out within their respective warrants which conferred upon them powers to act as "judicial" institutions. In addition, a new power in the name of the state was superimposed over these courts, and all fines and monies raised in them were to go into state coffers and were no longer to be under the control of presiding authorities.

The changes in the judicial system were accompanied by

those in the legal system, and occurred in stages throughout the colonial period, though in 1938 the process intensified when simultaneous proclamations were passed introducing the Native Courts System,²² the Subordinate Courts and the High Court.²³ The first formed the initial customary courts structure, and today they consist of the Central and Local Courts and the Court of the Judicial Commissioners. The latter two constitute what in the context of this thesis are referred to as the received law courts. In their origin, the customary courts were intended to replace the indigenous courts of headmen, chiefs and the king. But empirical evidence shows that this is not what happened; instead the courts of traditional authorities continue to function outside the officially recognised structure bearing the same features of the pre-colonial times. This suggests that the judicial system of Lesotho is more than just dualistic, rather what we have is a triadic or even a multiple system consisting of two levels in the official structure - customary courts and the received law courts - and then the "unofficial" chiefs' courts. The officially recognised courts since the colonial times have remained basically the same and even since independence no serious attempt has been made to change or transform the court system.

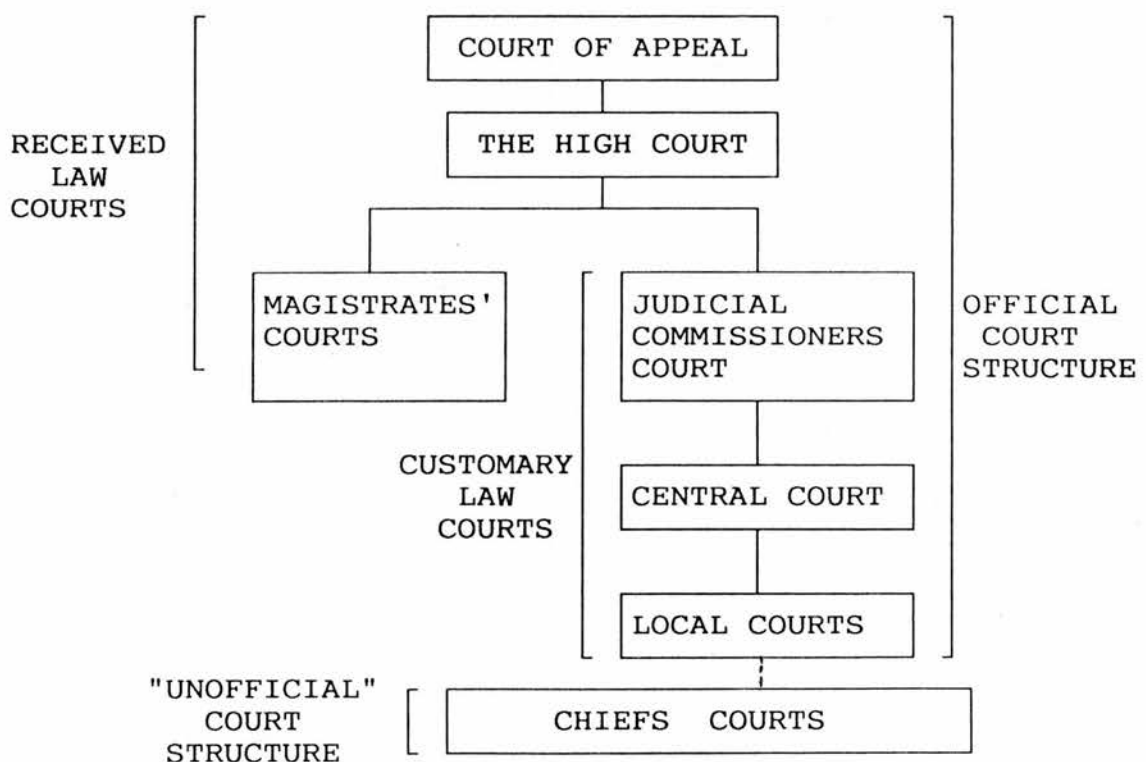
The received law courts forming the second level of the officially recognised judicial structure, bear more characteristics of the adversarial model of trial than the customary courts. In them the presiding officers are

recruited on the basis of qualifications and merit determined mainly by the kind of training they have received, and this has become more so in recent years.²⁴ In their theoretical outlook the official courts possess features of the western world courts, including such features as the employment of legal representation, trial before a neutral body, adversarial procedure, just to mention a few. These courts are backed in their judgements by the organised power of the state and the decisions they make are binding to all parties. At the practical level, however, the customary courts have a close working relationship, as mentioned earlier, with the "unofficial" Chief's Courts especially in terms of procedure and rules of evidence. The received law courts also, from the data obtained during the fieldwork, have been found to operate in a distinctive manner from the courts in the western world despite the theoretical aspects they share. Although some practices similar to those prevalent in the western world can be identified, the situation in the official courts is much more complex influenced mainly by the fact that the social environment and the cultural expectations in this case are somewhat different. The most influential conditions in this regard include the coexistence of judicial processes of different origin exerting pressure on each other, and this is coupled with the fact that the adversarial model in this case is alien - western institutions operating in a non-western setting²⁵ - working

among people who are familiar with principles of a different kind of judicial processes, and who have a different perception of what to expect and how to run dispute settlement processes, but also resting on a number of constraints such as unqualified "judges" in the customary courts, lack of adequate knowledge about accusatorial principles among some of the court personnel, insufficient numbers of qualified and experienced legal practitioners, the use of the English language²⁶ and so on. The resulting complex system of courts upon which the descriptions in this thesis focus is indicated in the accompanying diagram:

DIAGRAM 1

THE HIERARCHICAL COURT STRUCTURE IN LESOTHO



KEY _____ Indicates the lines of appeal
 ----- Shows the "unofficial" line of appeal between

the customary law courts and the Chiefs' courts.

The broad themes of the inquiry and descriptions contained in this thesis can be summed up in the following set of propositions:

1. That the judicial system of Lesotho is not dualistic but rather is a multiple system consisting not only of the officially recognised courts, namely the Customary Courts and the received law courts as depicted in existing literature, but also of the "unofficially" recognised courts structure which while its existence is acknowledged in some of the works, it has not yet been recognised that in practice they function as part of the overall judicial structure, and that they have tremendous influence upon what happens in the customary courts.
2. That the organisation and relationships existing in the practical world of the various courts, suggest the operation of a hierarchical system with the received law courts being superior, thus suggesting that the various courts do not function parallel to each other as suggested in the literature. This position becomes further illuminated when examining the jurisdictions of the various courts, and is confirmed by the fact that even the "unofficial" courts deal with matters which do not reach the official structure either because they are normally not reported to the police, or because the concerned parties prefer to seek recourse to the chiefs.

3. That the "unofficial" courts, because of the recognition of the significant role they play in promoting reconciliation among concerned parties, and because of mutual and symbiotic relationships they have developed with the customary courts and the infiltration they have had on the procedures and rules of evidence used in the latter, cannot be regarded as totally "unofficial" except in the theoretical sense.

4. In the western world, the "gap" between the theoretical aspects and functioning of the adversarial model have been explained in terms of the informal-manipulative practices of those actors who operate the system.²⁷ In the context of Lesotho the gap seems to be more connected not only to the fact that the model is alien, but to the reality that the social environment contains a different set of circumstances. Most prominent among these is the coexistence of dispute settlement processes of different origin, which at the practical level tend to exert different kinds of influences on each other.

The descriptions made in this work are based mainly on information of how dispute resolution is carried out in practical reality, in addition to what has been written so far. I spent eleven months²⁸ in Lesotho doing fieldwork, and during this period, I observed many civil and criminal court proceedings in various courts. As well, I talked to judges, magistrates, legal practitioners, law teachers, and other persons who have something to do with and to say about

processes of dispute resolution in the country.²⁹ What finally emerges from all the information is that while the system strives to work according to the accusatorial principles it finds itself faced with a series of circumstances and obstacles preventing it from working as it should.

The thesis serves as example which "may assist an understanding of general issues concerning the possibility of incorporating other bodies of norms into legal systems, and the consequences of attempting to do so". (Woodman, 1985: 157). Lesotho as a case study, illustrates the kind of tensions that accompany such an enterprise, leading consequently to the creation of new kinds of forums and methods of dispute settlement which are neither wholly inquisitorial nor adversarial in character - a kind of "combined law" in the terms of Fitzpatrick (1985), influenced highly by cultural expectations of the people concerned. The extent of interactions between the "unofficial" chiefs' courts and the customary courts, is particularly an interesting one, and has not yet been addressed in any existing works on Lesotho.

CHAPTER 1

THE METHODOLOGY AND OUTLINE OF SOURCES OF INFORMATION

Because the scope of the study is so broad - involving making a description of existent mechanisms of dispute settlement in Lesotho, how these various mechanisms came to coexist; showing also the changes that have occurred over time, and how the present complex system presently operates; together with the rules of procedure and evidence employed in them and the manner in which these rules are made use of in practice - no single fieldwork strategy could alone have sufficed in studying these phenomena. Hence it became necessary to make a careful selection of a combination of methodological techniques that would assist in realizing and fulfilling the aim of the study. The methods of research, as Goodwin-Jones (1984) notes, are not incidental but tied into the crux of it. Thus the methods chosen in a particular study should be related to the research design and to the issues being studied.

Various works on social research have noted the importance of proper selection of field techniques as part of the whole research exercise. Generally, it has been argued that such exercise does not involve identifying which technique is most appropriate or better than others, or in the words of Burgess (1982), it does not only involve 'outlining an ideal scientific procedure' of data collection. But rather, as pointed out by Becker and Geer

(1982), what is required is a selection of a data gathering technique that maximizes the possibility of discovering all of the phenomena under study. Zelditch (1982) says it is more fruitful to recognise that a field study does not involve using a single method; seeking a single kind of information, rather the kinds of methods employed depend on the kinds of information sought. In this particular enquiry each of the selected techniques, became suited in collecting different pieces of information at various stages of the research.

Part of the information necessary in this research was obtained through open-ended interviews with various categories of informants and respondents. But it was further realised that employing such a method alone would not be sufficient. As Beattie (1964) explains:

Unless the anthropologist 'takes part' in the culture ..., he can never really hope to see it as its members see it. Only by at least some participation in community life can he hope to understand what people really think and how they really act, which are not always the same as what they say they act, when they are asked (Beattie, 1964:87).

Acting on the word of Becker (1958) that observation produces an immense amount of the detailed description - which the thesis is all about - courtroom observations were seen as the most feasible approach to complement the information gathered through the interviews. A further characteristic feature of observation is revealed by Becker and Geer (1982) that it provides first-hand reports of events and actions, and a much fuller coverage of an

organisation's activities, giving direct knowledge of matters that, from interviewing, could only be known by hearsay.

It was through the characteristic nature of the observation technique, in particular, that the data for this thesis was mostly gathered. Since participant observation is deliberately unstructured in design (Denzin, 1970), it further provides for an opportunity to maximize the discovery and verification of the observed behaviour and meanings inherent in the symbolic world. This point is further discussed later on in the chapter; under the sub-heading of " Courtroom Observations".¹

For purposes of elaborating on the sources of information and methodologies employed in this study, and also to facilitate easy reading this chapter is divided into two main Parts. First, is the literature review section, showing how secondary data and literature were employed to try to understand the legal system of Lesotho and its development, together with changes that have been introduced in the judicial structures and the methods of dispute settlement to the present moment. The second part consists of the methods employed for collection of primary data, in which courtroom observations and interviews were used to gather empirical evidence about the operations of the courts.

According to Denzin (1970) such a blending of methodological techniques, as that employed in this study, is only characteristic of participant observation which he

describes as a field strategy capable of simultaneously combining document analysis, respondent and informant interviewing, direct participation, and introspection. The use of each one of these techniques in the present research is discussed in the sections that follow.

1. LITERATURE REVIEW

To arrive at the description about existing forums and methods of dispute settlement and how they operate in their endeavour to administer justice, the study began with the literature review of the variety of works on the legal system of Lesotho generally, its development and changes that were introduced during the colonial era, especially as they affected the judicial institutions in terms of their structure, jurisdiction, personnel, rules of procedure and evidence.

Furthermore, it became necessary to consider pertinent literature on dispute settlement processes from other parts of the world. These works and the knowledge gained from them are made use of in the subsequent chapters of the thesis, to verify and supplement the information obtained through court-room observations and interviews carried out during the fieldwork. The following is a description of some of the literature that was reviewed, and how each category became useful for purposes of this thesis.

a) Literature on the Historical Background.

In view of the changes that have occurred in the legal system, judicial structures and their jurisdictions, and

methods of dispute settlements, it first became necessary to set the study into historical perspective.

A wide literature review was thus made, examining some of the work done by authors such as Ashton (1952), Burman (1976,1985), Duncan (1960), Hamnett (1975), the autobiography of Jingoos by Perry and Perry (1975), Jones (1951), Machobane (1985), Maope (1985,1986), Mohamed (Judge; 1985), Palmer and Poulter (1972), Perry (1977), Poulter (1979), Ramolefe (1969), Sanders (1985), Hamnett (1979) and others. These works enabled me to work-out the nature of dispute settlement processes at different historical times and also in identifying various aspects regarding their organisation, recognition, constitution, powers, jurisdiction, purpose, procedure and rules of evidence that applied at each historical point. These works, however, pay attention to the customary courts and the received law courts, arguing, therefore, that the judicial system of Lesotho is dualistic. Some go on to add that the above two structures function parallel to each other (e.g. Palmer and Poulter (1972), Leslie (1969), etc.).

In addition, a review of official documents pertaining to and indicating trends in the changes mentioned above was made. Some of these are included in Appendix J. There are many more of these official documents, only a few are mentioned. An elaborate discussion of the changes introduced by these proclamations is contained in the subsequent chapters.² These documents point to the beginning of the shift away from the indigenous methods of

dispute settlement, presided over by chiefs and headmen, to the establishment of a new system of courts referred to in this thesis as the official courts structure as well as changes in the constitution, powers and jurisdiction of the courts at various levels.

The textual research on Lesotho, enabled me to work-out how the various courts structures (Diagram 1, p. 15) are placed within the overall legal system. To these I have added the "unofficial" chiefs' structure. Thus it assisted in setting the stage for the fieldwork. It is the Courts identified in the Diagram 1 which became the focus of the study, my contention being, they all form the totality of the machinery of dispute settlement among the Basotho today. The nature and origins of each one of them is dealt with further on in the thesis.

b) Literature from Other Parts of Africa.

In addition, the literature dealing with the nature and mechanisms of dispute settlements in other parts of Africa, became of great value in building up a greater knowledge of the various mechanisms and principles for settling disputes in different societies. Very little has been written on Lesotho especially with regard to the indigenous methods. Some of the works considered here include the following: Beattie (1957), on the informal judicial activity among the Bunyoro of Uganda; Gibbs (1963), on the therapeutic effects of the Kpelle of Liberia moot; Ndaki (1981); Comaroff and Roberts (1981); Colson (1974); Gluckman (1969) on procedures and evidence in

African customary law. As shall be indicated later on, many aspects described in these literature prevail, to a large extent, in the "unofficial" chiefs courts.

In addition I learnt more about the nature of rules of procedure and evidence these forums employ, criticisms raised against them, their ideology, and, their strength or advantages. The works of Allott (1965), Junod (1966), Bennett (1985), Chimango (1977), etc. outline how African dispute methods were affected by the introduction of foreign systems of law. The respective works focus on different aspects, of course.³ For purposes of this chapter, it is not possible to refer to all such works here, but their usefulness becomes apparent later on.

c) Literature on Legal Pluralism

Dealing with dispute settlement processes in a situation where there is a coexistence of forums and methods of different cultural origins, also necessitated examination of existing works from the field of legal pluralism. Such literature has become relevant in this thesis in a variety of ways. While Snyder (1981) and Griffiths agree that a satisfactory theory of legal pluralism is yet to be produced, both acknowledge the coexistence of a plurality of legal orders or their fragments in different societies. In the present work we examine the coexistence of the "unofficial" chiefs' courts originating from the indigenous customs and laws of the Basotho, with the customary courts and received law courts both of which are officially recognised, and were

introduced during the colonial period, bearing a different ideological and cultural philosophy.

The inclusion of the "unofficial" courts, in addition, puts forward another important assertion within the legal pluralism scholarship. This relates to the non-monopoly of state law, over legal phenomena (Allott and Woodman, 1985), which in turn is connected to the interest the field of legal pluralism has portrayed about the concept of "legal centralism". According to Galanter (1981), this concept was first coined by Griffiths (1979). Furthermore, the focus of the field on questions of "folk law" (Allott, (1985); Galanter, (1985); Moore, (1973)) whose approximate synonyms have been given as "people's law, customary law, unofficial law, and indigenous law" (Allott and Woodman, 1985:2), has been useful, for instance, in sorting out the statuses of the customary courts and the "unofficial" chiefs' courts.

In summing up the topics studied in the field of legal pluralism, Allott and Woodman (1985) note the following: content of contemporary laws (not excluding laws and institutions not recognised by the state); their relations to other social facts; their emergence; interaction between different laws (e.g. incorporation, choice of law, recognition of one law by another, etc.); their influence upon each other; and so on. All of these are relevant in the present descriptions. Other works found to be useful besides the ones already mentioned include: Allott (1984), von Benda-Beckmann (1984; 1985), Fitzpatrick (1984; 1985),

Chanock (1978, 1985), Roberts (1984), Santos, De Sousa (1984), just to mention a few. The usefulness of these works became even more significant when the data collected revealed a high level of interaction between the "unofficial" chiefs' courts and the customary courts.

d) Review of Literature from other parts of the world.⁴

Finally consideration of the literature from other parts of the world was important. Among these are:

- i) Those on the features and nature of dispute settlement machineries in societies of different modes of production and levels of development, such as the work by Roberts (1979).
- ii) Those on dispute settlement in respective communities, for example, that on rural Turkey by Starr (1978), whose characteristics I found to resemble those of dispute settlement in the "unofficial" courts.
- iii) Those describing the routine operations and behaviour of the courts focusing on the theory and practice of criminal justice institutions, McBarnet (1976, 1981) and Carlen (1976), Blumberg (1967).
- iv) Those focusing on the critical aspects and weaknesses of the adversarial trial procedures such as the works by Baldwin and McConville (1977, 1979, 1981), Bottoms and McLean (1976), Ericson and Baranek (1982), Frank (1949), Freeman (1981), Friedland (1965, 1968, 1975), Galanter (1974), Paterson and Bates (1983), and Zander (1969, 1973, 1974).
- v) Those suggesting solutions to overcome the

shortcomings of the adversarial system, for example, Cavanagh and Sarat (1980), Myers (1981), Wexler (1970, 1972), Yngvesson and Hennessey (1974).

vi) Those suggesting alternative forms of dispute settlement such as Danzig (1973), Danzig and Lowy (1975), Merry (1979, 1982), Sarat (1976), and Tomasic and Feeley (1982), Felstiner (1975), Nader, (1979).

e) Other Pertinent Literature.

As envisaged during the preparation for the fieldwork it also became necessary to review some of the literature on the notions of justice. In my opinion various methods and mechanics of dispute settlement are underpinned by different notions of justice. For instance, the adversarial system appears to be linked to "legal justice"⁵ as against the idea of "social justice".⁶ The indigenous judicial system - now largely forming the "unofficial" court structure seems to bear the characteristics of the latter, while on the other hand, the new official courts, and in the main the received law courts, are marked by principles of "legal Justice".

Social justice emphasizes peace-keeping and social harmony and has further been described for example, by Kamenka and Tay (1979), as more profound in theories of justice that elevate its connection with the social organism or whole, with determining the "proper" place of individuals, activities, and institutions in a structured totality free of destructive conflicts. The legalistic notion of justice, on the other hand, arises out of the

growth of individualism and is often identified with the modern commercial, politically pluralistic and democratic society with a different type of law and legal regulation.⁷

Additional works considered under this section include the following: Miller (1976) on Social Justice; Perelman (1963) on the idea of justice and the problem of argument; and Rawls (1971) on the theory of justice.

Doing this research thus involved, first of all, learning a lot about mechanisms and methods of dispute settlement from a variety of literature. The list of the works cited above, does not claim to be exhaustive. It is only meant to illustrate some of the important literature which were used to provide a background for this study, even before the actual fieldwork was conducted. Not having any formal legal training myself, this literature review assisted me to get acquainted with the various aspects relating to how the courts operate, the legal terminology and concepts; and the legal process itself.

2. FIELDWORK

The methodology selected for the fieldwork as pointed earlier, consisted of courtroom observations and open-ended interviews. The main purpose was to facilitate easy cross-checking of the validity information gained through each one of these techniques, and to find out whether conclusions reached about the observations were correct.

I found this multi-dimensional approach to be very useful, each of the techniques assisting to gain

information and for getting answers to certain questions and events which the other could not so adequately obtain.

For example, it would not have been easy to come up with concrete instances indicating people's understanding or lack of understanding of the rules of procedure and evidence through the interviews, but the observations made this possible. To illustrate this point further, while it would have been easy to interview the people about how the courts operate and the extent to which the new court procedures and rules of evidence are employed, I would not have come up with empirical evidence supporting their statements, which has been possible through court-room observations. In fact as Beattie (1964) points out, observing how people think and really act, may not always be the same as what they say they think and how they say they act when asked about it in interviews.

These research instruments also tended to complement each other. I was able through the fieldwork to check some of the conclusions tentatively deduced from the preliminary literature review I had done; and also to find out how far actual practice fitted with or differed from the written accounts of how the overall system of courts operates.

Careful consideration was taken to interview as wide a variety of persons concerned with the use and functioning of the courts as possible. Attempts were made to include in the sample of informants and respondents, as many categories as possible. This included not only the court

personnel and other agents of the justice system, but also the parties in the disputes and the witnesses too. So that the conclusions made in this thesis could be accepted as adequately representative and accurate about the functioning of the courts and dispute settlement process in Lesotho. The courtroom observations were conducted in a range of courts, and I did not only concentrate on one level of the courts but a cross-section of them.⁸ It also means that a wide variety of cases were included, both civil and criminal, among the sample of proceedings observed.

The fieldwork was carried out over a period of eleven months beginning in October, 1986, and ending in August, 1987. The work-plan (Appendix C), shows how the fieldwork activities were organised and scheduled over the time I had available. However, a few explanations should be made about the fieldwork plan. Phases 2 (Court-room observations) and 3 (interviews) of the fieldwork took place simultaneously, and the interviews of most parties and witnesses took place when proceedings were on recess and in between the proceedings. Attempt was made to follow this workplan as closely as possible especially as the allocation of time for each of the phases was concerned. The last two months, July and August, were used to fill up the gaps, having gone over the data at hand.

With the exception of the Judicial Commissioners' Court, the observations in other courts were carried out at

different points of the fieldwork. At various times, the research activities of courtroom observations and interviews were interchanged. Denzin (1970(a)) argues that this has the advantage of enabling the assessment of various variables. Schwartz and Schwartz (1955) on the other hand, point out that the observer's presence in the field produces behaviour and actions that would otherwise not appear. It was in an attempt to reduce these reactive effects, sometimes from my part as against that of those under study, that the activities of the fieldwork were varied at different points of the research. At times I got tired with collecting data in one particular court, which greatly affected my productivity in recording the events of the proceedings in question. On such occasions I would leave the court and carry on with another activity such as interviewing. This was also in line with the advice of Denzin (1970) that the researcher can leave the field for a period of time and re-enter at a different point to access his reactive influence.

The above is also an illustration that the processes involved in research do not consist of prescribed stages following one another neatly as often presented in the books. It further confirms the statement of Watson (1968) which demonstrates that:

Science seldom proceeds in the straightforward logical manner imagined by outsiders. Instead, its steps forward (sometimes backward) are often very human events in which personalities and cultural traditions play major roles (Watson, 1968:13).

As further argued in Burgess (1982) there should be awareness that research does not occur in 'stages' and does not follow a linear path, but instead is a social process, in which overlap occurs between all areas of the investigation.

ACCESS : REQUESTING PERMISSION TO CARRY-OUT THE STUDY

First, permission to carryout the research had to be sought from the responsible Government Ministries under which the dispute settlement machineries fall. As discussed in some of the literature on research methodology, access is not simply a matter of physical presence or absence; and it is not simply a matter of the granting or withholding of permission for research to be conducted. Even for domains which are regarded as "public" - in the sense that no process of negotiation is required to enter them - the literature points out that, things are not so straightforward. The main issue, pointed out is that, in many settings, while physical presence is not itself problematic, appropriate activity may be so, especially where permission or access has not been properly obtained.

During the preparatory stage I had made the decision to include both the official and the "unofficial" court structures in the study, which in my conviction represents a complete picture of the nature and mechanisms of dispute settlement in Lesotho. It was felt that the exclusion of either of these from the study would result in an

incomplete picture of the nature of and mechanisms of dispute settlement existent in the country. The inclusion of the various structures was also crucial in another respect, that the thesis is also about the differences and/or similarities among existing mechanisms of dispute settlement operating in the country at the present moment.

Gaining access into the official structure of courts did not pose any major problem. I contacted the Ministry of Prisons and Justice to which these judicial courts are responsible, and I received a prompt and positive response. A letter of introduction was issued addressed to the court personnel concerned - judges, magistrates and court presidents. Perhaps the reasons for the immediate response from the Ministry ought to be advanced, the main one being that I had, prior to this, been in close contact with the Ministry in a variety of ways. My interest in knowing more about dispute settlement processes became sharper during this period of contact with the Ministry.

My first links with the Ministry of Justice began in 1975/76 when I was a university student at Roma. During the long vacation of that academic year and also in 1976/77 I did part-time jobs with them. Furthermore, following the completion of my studies in mid-1979, I took a job with the Department of Prisons. So when I made a request to carryout the present study, I was already known to a good number of the staff in the Ministry, hence perhaps the cooperation received. Close links continued even after I left the Department of Prisons, since I quite often helped

with the instructional courses they run; mainly for the new recruits and I also served on the Prisons Visiting Committee for the Maseru District for three consecutive years beginning in 1982.

During one of the vacation jobs with the Ministry I had actually been placed with the High Court of Lesotho as a clerk assisting in receiving and forwarding papers for cases coming before the court. Here too, I had a number of people who knew me, for instance, I had had previous contact with one of the judges, the Registrars, and some of the interpreters. A lot of the lawyers, both defence counsels and prosecutors, were also known to me, some having been colleagues and fellow students at the university.

The cooperation was built-up even further when later I met the judges to introduce myself as a researcher and to make arrangements to begin the observations of courtroom proceedings. They first agreed to my request for interview appointments, and then allowed me to observe the proceedings in their courts. The same happened once I had approached the Chief Magistrate, he agreed to an interview, and then the other magistrates only seemed to follow suit.

The same cooperation was experienced with the customary law courts' personnel. The Judicial Commissioners agreed to an interview, and allowed me to observe proceedings in their courts. The "Special" Local Court President in Maseru welcomed me too, so did the President of the Roving Stock-theft Central Court and their

staff.

Despite the overwhelming cooperation received, I had to exercise a good deal of control not to lose track of the interest of my research and not to create a different atmosphere towards my presence in the courts. Good rapport and working relationships had to be maintained for the success of the study. Further discussions about the importance of this factor are contained in the next section.

Thus to an extent I was familiar with the setting I was to be researching on. But this was only in so far as knowing some of the court personnel was concerned. The activity of court-room work itself was not so familiar. Although I had been to the High Court several times before, for instance, sometimes following up the events in the proceedings was not so easy; an experience which from time to time caused a panic of self-doubt, and a sense that I was somewhat an inadequate research worker, because my observations were not falling neatly into the sort of categories suggested by the wisdom received through the literature review I had done.

Because of such familiarity with the research setting, I found it much more difficult to suspend my preconceptions, deriving both from the literature review and from everyday knowledge. It all looking so familiar, it was at the beginning very difficult to single out events that occurred during the proceedings, even when they were happening right in front of me, and it took a tremendous

effort of will and imagination to stop seeing only the things that are conventionally "there" to be seen (cf Becker, 1971) and pick out aspects of relevance to my research. It took a great deal of will power too, to sit through the court-room proceedings, for instance, and to see (or record) anything beyond what "everyone" knows, and what has already been written about the judicial processes in Lesotho.

The familiarity with the setting of the research caused another further problem. This problem is explained in the literature on social research methodology that in one's own society one may not be allowed to take on a novice role. That is, one is faced with the difficult task of rapidly acquiring the ability to act competently, which is not always easy even within familiar settings. While simultaneously privately struggling to suspend for analytic purposes; those assumptions that precisely must not be taken for granted in relation with participants, from time to time some of them tried to influence me to reveal conclusions reached out of the study, which was difficult and would not be possible until the whole research exercise was complete. But to explain this to them I had to exercise extreme caution so as not to annoy them, as it could destroy the relationships already established with them.

Things had worked according to the plan, but so far only the question of access into the official courts had been dealt with, there was still outstanding, the issue of

gaining access into the "unofficial" courts. For this, I had to approach the Ministry of Interior which is the authority with responsibility over matters of Chieftainship Affairs and these category of courts are presided over by chiefs and their assistants in the villages. In the same manner as in the case of the Ministry of Justice, I made a written request for permission to enter the villages and visit the chiefs' courts; but for months on end there was no reaction.

The only explanation I can offer why perhaps no response was forthcoming from the Ministry is with regard to the tensions caused by the continued existence and operations of these courts. In strict legal terms these courts ought not to handle judicial matters at all, and yet in reality everyone knows that they are doing so. However, my request was in a way asking the Ministry to grant permission into institutions that are otherwise "unofficial", thus conferring over them a status of officialdom. They could have dealt with the request to enter the villages, I suppose, as long as it was not tied to the issue of dispute settlement by the chiefs' courts. Yet that was exactly the purpose of the research for which permission was being sought; thus I could not avoid revealing that.

I was faced with a dilemma, and could not enter the village for purpose of research without having been granted permission to do so. The alternative could have been to move into the villages and carry on with the observations

of the chiefs' courts. Yet this could have possibly made research activity extremely difficult,⁹ because public domains such as the chiefs' courts, among other things may be marked by style or social interaction involving what Goffman (1971) terms "civil inattention", such that anonymity is not their contingent feature. The fieldworker's attention and interest may thus lead to the possibility of infringement of such delicate interaction rituals. This raises the point that was made earlier on that conducting research in many settings is not merely a question of physical presence, but it must also permit appropriate activity to be carried out. Entering a setting without permission also involves a question of ethics in social research, which states in general terms that the researcher's presence and purpose should be explained to those being studied.

The role I would have had to play under the alternative referred to above, is described in Denzin (1970) as the "complete participant" role in research, in which the observer and his interests are wholly concealed and not made known. But disguised entry poses problems such as those with regard to recording observations. It would have meant I could not openly have taken notes as in the case of observations in the official courts, and I would have had to resort to "backroom" recording at the end of each day. Ultimately this would have raised doubts about the accuracy and validity of the data collected in this manner. The fieldnotes obtained in this way would

have been affected by memory distortions leading to confusion of issues or speakers, and there would probably be incomplete recording as a result of general field fatigue. Despite this problem, the fact that I needed the data about what happens in the "unofficial" chiefs' courts could not be dismissed, and I needed to devise some means around this problem, as described below.

This being the position, I had to adopt the second best strategy to interview the chiefs about what goes on in their courts. The questions asked were aimed at getting, as close as possible, descriptions of how proceedings in the "unofficial" chiefs' courts are conducted. This involved, first, making enquiries about some of the renowned persons who could most ably provide such information. Through some of the informants, this became possible. Consequently, some chiefs were identified and were requested to provide detailed descriptions of the kinds of disputes that come to their courts, and generally about the nature of proceedings therein. In addition, I continued to interview various categories of respondents and informants including the parties and their witnesses on the one hand, and the court personnel such as the magistrates, Director of Public Prosecutions, the Attorney General, the judges, legal practitioners and some intellectuals about aspects relating to the "unofficial" courts. They were interviewed about the existence of these courts, how they operate and their perceptions about them and the rules of procedure and evidence used there. It was striking how

members of the legal profession responded to questions about the chiefs' courts without any inhibitions whatsoever, as if they were not talking about "unofficial" institutions.

ACCESS : NEGOTIATING ACCEPTANCE AND MAINTAINING GOOD

RAPPORT

As is evident from the foregoing, the task I was faced with was not only of finding out how the courts operate, but also that of collecting information that would ultimately enable me to arrive at explanations about the observed situation, whatever it turned out to be. For instance, it meant not just studying the behaviour of the court personnel, for example, legal practitioners during the proceedings, but also understanding the reasons underlying such behaviour and their perceptions about how the courts operate. This was not easily accomplished. A good rapport had to be maintained with those constituting the area of study right through the period of the fieldwork for the objective to be achieved.

As Denzin (1970) points out, cultures do not provide within their social structures a role called "participant observer", therefore a fieldworker needs to convince those he is studying to accept him and allow him to question and observe them. The problem is in working out the relationships that lead to such acceptance and to its maintenance thereafter, in order to get the information

required.

However, on my part, the situation seemed to be eased up a bit by the cooperation I got as a researcher by the various categories of people I was working among, as shown earlier on. The legal practitioners, for example, were often at ease, and would discuss almost anything related to the cases they had, and about courtroom proceedings and that usually provided me with a lot of information and ideas.

Perhaps the above was to some extent facilitated by the uncertainty and confusion which seemed to have been caused by my presence in the courts. However, many were trying to figure out what a sociologist would be looking for in the courts. This can be demonstrated by questions and remarks passed to me by some legal practitioners. For example, one day one of them asked: "have you come to find out about the causes of divorce?" This was during a recess of the Motion Roll in the High Court; which normally is on Mondays. The roll of the High Court abounds with matters of divorce on such days. I am not sure that I can remember vividly what my response was to the question, but the same legal practitioner went on to point out that: "... in most of these cases; adultery is the ground on which divorce proceedings are instituted". On yet another occasion, it was during the Motion Roll proceedings, another lawyer whispered to me and said:

"have you observed the high frequency of divorce cases? Even the marriages are just as many as that."

He smiled and then walked out of the court. This was, in my opinion, an attempt from their part try and place me within a recognizable social role which would be acceptable to them. As a non-lawyer they did not fully understand the meaning of my role among them. As a sociologist, they had an impression that my interest in being in the courts could be in investigating about matters such as divorce which, as it emerged from further discussions with some of them, is regarded as one of the most serious social problems now threatening the fabric of the Basotho society.

They could not see the deep interest my research had in the law, and, in particular, how one of its institutional structures - the courts - actually operate. They failed to judge that, as part of the study, I was interested in their work and how they carried it out. Hence a lot of information was dished out voluntarily during the discussions they had with another in my presence. In Quthing, I came to discover later on, that the clerks of the Magistrates' Court and the prosecutors; associated me with the Ministry of Justice or even more with the Judicial Commissioners' Court, since I had arrived, for part of the fieldwork, while this court was on circuit there. Because of these assumptions they had about me, they answered freely to my questions about the rules of procedure and evidence and any other matter raised with them.

Sometimes I did not know how to respond to the comments such as those made by the legal practitioners

quoted above. Even when I responded, it was with utmost caution not to destroy the good relationships already established. It revealed, however, that the process of negotiating access and establishing rapport is a matter of progressive initiation, which is extremely important, particularly when the area of study consists of people whose work is founded upon beliefs and commitments of a profession such as that of the legal practitioners. Often I had to be careful not to appear as having feelings of disapproval about how the courts operate, or even to have intends to initiate action about how the legal institutions and professionals function. Putting up such a "personal front" (Goffman, 1955) was an important factor in negotiating and maintaining good rapport in the field.

Furthermore, the uncertainty about my role in the courts, provided a good chance "for listening to telephone conversations, noting passing comments, sitting in on discussions" (cf Goodwin-Jones, 1984: 33) by various court personnel, such as the magistrates, prosecutors, defence counsels, court clerks, who would be generally chatting about various aspects relating in one or more ways to my research. With this I was able to build up a picture of the normal routine operations of the courts. Among the suggestions put forward for implementing the participant-as-observer role Polsky (1967) includes "learning how to listen and keeping one's mouth shut". That is the strategy I was employing here. The parties and their witnesses too passed comments about the functioning of the

courts. A frequent comment often pertained to delays encountered in the administration of justice due to the complex rules, and heavy expenses borne by the people as a result.

Together with the information gathered from the open-ended interviews and prolonged courtroom observations, I was able to judge how far the picture built up represented normal practice, and also to find out reasons, opinions, perceptions and explanations about what is going on. The question that could be raised is how far the court observations and the interviews were representative of what happens in the courts in general. This point is answered in the next two sections of this chapter; where the extent of the observations and interviews are discussed respectively.

It was equally important to work-out good relationships with the clerks of court at various levels and with the interpreters too - what could be referred to as "court marginals".¹⁰ They became, as it turned out to be, good sources of information and guidance, for instance, about what cases were on the daily rolls and sometimes even making it possible to arrange appointments for interviews with the judges, magistrates or court presidents. In court cases that had begun before I started visiting the courts; they would provide background information about what the case was all about and what was remaining of it.

Maintaining good relationships with these category of people was important and it made it easy for me even in

getting permission to take notes during the proceedings, without fear that they could be confiscated.¹¹

There turned out to be nothing so particular about the manner of dress for the general public in attendance, except the insistence that the men should at least have a jacket on; and women ought to have arms covered - no short-sleeved dresses - and also ought to have some form of head-cover. One Registrar of the High Court, when I questioned her about the issue of the head-dress, responded that she regarded this as some old practice inherited from colonial days. Despite this some members of the court personnel appeared to be very strict about it.

The application of the "dress regulations" (Parker, 1974) tended to vary from one court to another, depending also on who was presiding over the proceedings. For instance, at one of the sessions, a magistrate warned one woman who was in attendance that:

You should never appear before my Court
dressed-up in that manner.

When she said this, the magistrate was almost shouting. When I turned around to see who was being reprimanded, I discovered it was a young girl of about thirteen years. She had a short-sleeved dress on. Generally, though, the people observed the regulations closely, hence reminders such as the one above rarely had to be made.

I found I also had to be extremely careful about the forms of dress because as Patrick (1973) indicates, they form part of the crucial considerations for the researcher

who seeks to maintain the position of the acceptable marginal member, and a mistake over such a simple matter can, in fact, jeopardize the entire enterprise of research, for the purposes of which he is in that setting.

However, since I was allowed to sit together with the lawyers, through the influence of the Clerks of Court and the interpreters, I was saved from demands concerning a headdress, except in Quthing. The first day the Judicial Commissioner's Court came into session, the court messenger asked me and another young woman who was sitting next to me, to put on something on the head when the court next resumed. But realising my association with the court staff during the recess that followed, he never made further demands with me, the other lady had to get something though. The court messenger was only to remark during the lunch break that:

... you ought to set the example to the
other people though, as to how to
appear in court.

I realised that he thought I was either a legal practitioner or part of the Judicial Commissioner's Court, as I was with the Clerk of that court then.

The judges of the High Court were always robed; often in red, so were the Counsel appearing before them. The magistrates and the Judicial Commissioners also appeared in their robes, but it appeared to be common practice that counsels appeared before them unrobed. The majority of the prosecutors, except in the cases heard before the High Court, appeared not robed too; perhaps because most of

them are not legally trained. The police prosecutors appearing in criminal matters in the Magistrates' Courts were often uniformed, so did those who appeared in the Roving Stock-theft Central Court. From time to time, there would be uniformed police, acting as messengers of the court, but this was more common in the High Court, than in the Magistrates and Judicial Commissioners' Courts. Besides these, all other court personnel - interpreters, assessors - would be ordinarily dressed.

COURT-ROOM OBSERVATIONS

During Court-room proceedings notes of events as they unfolded were recorded. My main interest here, was to record anything that was said or done by those involved in the proceedings; be it parties, their witnesses or counsels, "judges" (those presiding over the proceedings - magistrates, court presidents, judicial commissioners inclusive), prosecutors and interpreters, which related to the application of prescribed rules and their implementation. The aim was to see how far these rules are generally applied and how far the people are familiar with them.

Furthermore, the intention was less concerned with recording the frequency and distribution of events, than with linking interaction patterns observed with the symbols and meanings believed to underlie such behaviour. This is connected to the purpose of the study in that it would enable me to arrive at a qualitative analysis of the

complexities involved in how the courts operate, especially in view of changes that have occurred within the judicial structures over time. By this is implied not simply spelling out the characteristics of the various judicial institutions, but rather unravelling the complex and interrelated connections between them, identifying their structure and nature, the similarities and differences they possess, capturing the historical processes they have undergone and describing their present reality, both in theory and in practice. It actually required watching the people in the court proceedings and dispute settlement, and seeing what situations they ordinarily meet and how they behave in them, (cf Becker and Geer, 1982), and further it meant talking with the participants and discovering their interpretations of the events and the observed behaviours.

Some focusing was necessary as it was not always possible to note down everything during the Court proceedings. Therefore, from time to time I had to decide what type of data was important, and make such decisions from moment to moment. Inevitably, some things which later seemed noteworthy were at times left out. The notes of the observations, however, contain the following: date, time and location of the proceedings; details about who was presiding, whether parties were represented or not; problems emerging from how the questions were asked and responded to; problems pertaining to the understanding or misunderstanding of questions; where parties were not represented whether they could examine, cross-examine, or

re-examine; indications whether there had been collaboration between the legal practitioners and their clients before the proceedings concerning certain routine operations of the courts; delays, postponements and what appeared to be their cause; questions relating to the translation of proceedings from English into Sesotho and vice-versa, loss or misplacement of documentary evidence, non-attendance of medical practitioners and so on.

For reasons explained later on, linked mainly to limited financial resources, the bulk of the court-room observations were carried out in the courts in Maseru (the Capital town). Some were done in Quthing, a district in the South of Lesotho. In all, a total of 259 Court proceedings were observed, and it is on the basis of these observations that part of the discussions and descriptions in this thesis are made. Attempt has been made to use some of the observed cases in the various chapters of this work.¹²

I had an opportunity to sit-in and observe proceedings in various courts: the High Court; the Magistrates' Courts; the Judicial Commissioners' Court; the Roving Stock-theft Central Court and the Maseru "Special" Local Court. On these various occasions, different judges, magistrates and court presidents were presiding; and prosecutors, defence counsels, parties and witnesses also changed with cases before the courts. I also had a chance to see various interpreters as well as court clerks in action. Thus a cross-section of actors were included in

the observations; which increases the validity of the descriptions and conclusions made in this work.

However it may be useful to point out at this juncture that it was not possible to observe each and every case to its completion, especially in action and trial proceedings. Sometimes my observations commenced in the middle of an already on-going case, or even stopped before the whole case was concluded. This was mainly in the interests of time (other proceedings such as in murder trials continuing for a duration of two weeks or even more), but it was also due to the fact that more than one court would be holding proceedings at the same time; and my interest was to include in the data collected, as wide a variety of cases as possible, for analysis in my thesis.¹³ Sometimes it became very interesting as I literally had to be moving from one court to another. To borrow the words of Denzin (1970), it meant partaking in as many of the activities as possible and joining in the daily rounds of activity of the people studied.

Through the information from various sources, it was possible to have a clue of cases that would possibly raise interesting facts pertaining to my research. Some of this information came from the court personnel themselves such as interpreters who would at times tell me what cases were on the roll for the day, and even give me a brief summary of the facts of a particular case. Some legal practitioners went a step further to indicate how they were going to proceed with a case, often this would be when a



technical point of procedure was going to be argued in defence.

The university driver who helped me during the research, especially when I had long distances to travel or if the roads to the places of research were not so good and needed careful driving, provided me with some information too. Often he would be attending proceedings in one of the other courts, while I was in another. One day he came to the flat where I was staying to inform me of a case concerning dispute over a dead man's body (a corpse). This was due to be in Maseru, according to his information, a distance of about 35 kilometres from where I was staying (University Campus). By the time we got there, no one seemed to have any idea of it in the Maseru Special Local Court. Following indications by some of the staff there, that it could be at the Magistrates or High Court; we rushed there. On arrival it was not there either - it was actually like chasing after people's court cases though.

Both civil and criminal proceedings were observed, though civil cases seemed appear more frequently at all levels of the court structure; but this was particularly so in the customary law courts i.e. the Local, Central and Judicial Commissioners' Courts. This is perhaps in the nature of the law itself, which has removed a great majority of the criminal matters from the jurisdiction of these courts - setting the penalties for most criminal offences too high than these courts are empowered to impose - leaving them only with what could be regarded as

"trivial" criminal offences. For instance, the provisions are such that once a criminal offence has been investigated by the police, it automatically as of procedure, has to be heard by a magistrate as a matter of first instance.

To get a full impression of how the courts operate did not only mean observing court-room proceedings, it turned out to mean "spending a lot of time hanging about with lawyers" (Goodwin-Jones, 1984: 32), the magistrates, other court personnel, while proceedings were on recess and after the sessions at the end of the day, thus "sharing some of their social, as well as professional, life" (Goodwin-Jones, 1984: 32). A lot of useful information was obtained from comments made during such "informal settings".

The strategy during the fieldwork was to keep on rechecking these observed behavioural phenomena, to ascertain their validity thus acting on the advice of Lindensmith (1952) that:

The investigator who has a working hypothesis concerning his data becomes aware of certain areas of critical importance. If his theory is false or inadequate, he knows that its weaknesses will be more clearly and quickly exposed if he proceeds to the investigation of those critical areas. This involves going out of one's way to look for negating evidence (Lindensmith, 1952: 492).

Checking the universality of the behavioural patterns mentioned above in the various courts, assisted in examining, redefining and reformulating the observations "each negative case calling for a redefinition, or a reformulation" (Robinson, 1951). Further data gathering

tended to take its direction from provisional analyses (cf Becker, 1958) made possible by this redefinition and reformulation of the observations. This exercise made it possible for me to discover how typical and widespread the observed events were. In Becker and Geer (1982) this exercise is described as a constant redesigning of the study to uncover new data.

INTERVIEWS¹⁴

This was the second methodology employed for the fieldwork. Open-ended interviews were held with various groups of informants and respondents.¹⁵ For Denzin (1970) open-ended interviews; as opposed to closed or structured ones, are typical in participant observation. Palmer (1928) summarized the aims of the unstructured interviews very well, noting that they provide the opportunity for the researcher to probe deeply, to uncover new clues, to open up new dimensions of a problem and to secure vivid, accurate, inclusive accounts based on the informants' personal experience.

The first category of respondents included various court personnel. I had an opportunity to interview at least two of the three High Court judges who were there at the time, all of whom were Basotho, magistrates of different classes, court presidents, both of the judicial commissioners now employed, prosecutors, defence counsels, the chief legal aid counsel, court clerks and interpreters.

I had no opportunity unfortunately, to interview the court

assessors, most of whom are quite elderly people, who could have been very informative, first about the new foreign judicial system and its procedures; secondly, about the indigenous system now largely forming the "unofficial" structure of courts and of customary law in general; as well as about their principles and procedures.

The next group of interviewees consisted of people whose cases had come before the courts, and have been sentenced to a term of imprisonment. At least a group of ten men from the Maseru Central Prison and ten women from the Maseru Female Prison were interviewed. I had requested the Prisons staff to make a random sample of the inmates. However, it may be worthwhile to mention that the sample at the Central Prison came out to contain more of the long-term prisoners. One of the originally selected male inmates refused to be interviewed, then I had to request permission to interview yet another to maintain the figure sample of ten. The sample of female inmates included at least two juvenile offenders. These, however, could not recall, for instance, whether they had appeared before a "Children's Court" or a Subordinate (Magistrate) Court. They could not make the distinction between the two. The law makes provision for such an option depending, for instance, on the nature and seriousness of the offence for which a child is being charged.¹⁶ These inmates were asked to recall events of the days they appeared in court, and this was in an attempt to establish whether they could remember what happened and what they

made of the whole court process. From this it was possible to make an assessment of their understanding of the procedures and the rules of evidence and other aspects of the proceedings, including issues related to legal representation, conducting proceedings in the English language and so on.

One thing most of them seemed to remember vividly was with regard to their sentences - length of the term of imprisonment - which they recited with much ease counting even the months. Often they could not tell exactly what the charges were as read in the court. For example, they made no distinction between charges of murder and culpable homicide. They could not recall discussing the charges with their counsels so distinctively. Some complained that the number of charges had been increased. I think here, they were not aware that a chargeable offence could be split into various counts; and that they could plead guilty to some and not all of the counts and that each one of them could carry a separate sentence or they could be all taken as one for purposes of sentencing.

Those sentenced to death expressed it in the words which when translated would read, "you will hang, and hang until you are dead". In Sesotho, they tended to express it in almost the same words, as if in court it was said to each one of them in exactly the same fashion - perhaps by the interpreters. The male inmates used other common expressions such as referring to the High Court as "Lekhotleng le letala" (the Green Court) because the

outside roofing of the court is painted green. They also mentioned the name of Justice Cotran, one of the High Court judges, who has now left Lesotho, quite frequently. They would say, for instance, "Lekhotleng la Cotran" meaning, Cotran's Court.

I carried out interviews with other parties not given custodial sentences as well. The majority of whom had been involved in civil disputes. Some interesting points were raised, especially by those involved in divorce proceedings. In a similar manner the questions put to this category of respondents, related to events of the court proceedings involving rules of procedure and evidence and their understanding of these rules.

The last group of interviewees consisted of people whom I thought knowledgeable and experienced in the work of the courts or historical developments in Lesotho, especially those pertaining to the legal system and the judicial changes in particular. Some had first-hand information of historical developments - one, (Bereng) for example, worked under the colonial regime and was actively involved in the preparations for Lesotho's independence in the mid-1960's and was also involved in the drafting of the Independence Constitution. Another (Damane) is regarded as one of the great historians of Lesotho at the present time; he was formally a University lecturer in the Department of History of the University of Lesotho and is now retired (see Appendix F).

Interviewing these people, added another dimension in

the techniques employed - that of oral history - which was part of the attempt to get close to the data in order to see how the Basotho themselves interpret and view the judicial processes and the nature of dispute settlement, as well as the changes that have occurred over time. As Burgess (1982) points out, oral history provides materials concerning people about whom very little written documentary evidence is available. This sort of technique counteracts the problem that arises in the use of written evidence which Samuel (1975) comments upon as follows:

It is remarkable how much history has been written from the vantage point of those who have had the charge of running - or attempting to run - other people's lives and how little from the real life experience of the people themselves (Samuel, 1975 : XIII).

Historical accounts of the legal and judicial system of the Basotho have in fact been written by scholars and other people from outside. This is mentioned here not by any means as a suggestion that such accounts should be discarded. Some of these are referred to under (a) of the literature review section, and their usefulness cannot be undermined. Rather the use of oral histories brings forward a different perspective of the past, and complements what has already been documented, thus counteracting the problems that would arise if only the written accounts had been considered in this thesis; by offering further dimensions from the Basotho's point of view.

The above were formal interviews, however, in

addition, informal discussions were held with various people, for example, those attending court sessions (witnesses, relatives of parties, other observers), staff from the Ministry of Justice, and colleagues at the University of Lesotho. Some discussions took place while court proceedings were on recess. Sometimes I would not be taking part in the discussions myself but would listen to the remarks and comments from these various people. Other discussions took place even outside the courts' precincts.

The main idea was to enter into conversations with some of the participants and informants in the area of study, in order to discover their interpretation of the events observed, (cf Becker, 1958). As Palmer (1928) indicates:

The conversations of human beings are an important part of the data of social research, as well as an important part of social research technique (Palmer 1928: 169).

He further writes that, the ability of the objects of social research to converse with the investigator is so vital a part of the subject matter of the social sciences, that it cannot be disregarded in any well rounded study.

Because of the methodology adopted which was unstructured, it was possible, during the fieldwork, to include aspects emerging from the observed events in the interviews, using them to get further details and better informed descriptions of how the courts operate. The unstructured interviews, in addition, maximized the possibility for the informants and respondents to say more

than what I had expected, and did not narrow them or restrict the perspective of the study - the interviews were flexible, but also controlled - making the informants focus on the judicial processes and the nature of dispute settlement. The designed questions as contained in the schedules (Appendix G) served only as guidelines, but in the main assisted as a means of keeping the subject to the major themes, and to secure more details at given points of a narrative, or to stimulate conversation when it tended to lag (cf Burgess, 1982).

The interviews produced voluminous data, especially because a tape-recorder was used in an attempt to record them as close to verbatim as possible. It provided for a fuller recording, not losing on any data that could open-up new promising avenues for further interviewing. The use of a tape-recorder was approached with utmost caution because sometimes it can be counter effective, and inhibit full and frank discussion of issues. However, none of the respondents, because of the good rapport I had established with them, resisted being tape-recorded. What really consumed much time is the transcription of these interviews into writing, ultimately an assistant was engaged to help in finishing up the job. The transcriptions were later on checked against the tape-recordings for any omissions.

During the interviews, I also made short notes, especially on the points that I felt I would need the informants to elaborate upon. Questions on these points were brought up at the convenient time, either during or at

the end of the whole interview. This helped to develop the accounts further, on the items most pertinent and appropriate to the purpose of the study.

Attempt is made in the thesis to make use of the information gained from the interviews, and great care is taken to be as accurate as possible, so as not to change the sense of what the informants said. Hence while some of the quotations may appear to be linguistically incorrect, they are a close statement of the respondents' views.¹⁷

UNPLANNED FIELDWORK ACTIVITIES

During the period of the field research, I discovered there were certain other activities which were not part of the planned strategies, but would be useful in throwing more light on some of the issues under study, and, in addition, would aid in developing and seeking further directions in the description of how the courts operate. Some examples of observations and information obtained from these activities are used to complement the main trends of descriptions and arguments in the subsequent chapters.

One question that often bugged my mind was whether the teaching of law, in a country with a mixed system of law and courts such as Lesotho, for example, encompassed principles of both the customary law and the received law.

I therefore, decided to request the Faculty of Law of the University of Lesotho to allow me to observe lectures for

some of their courses. Other activities included the proceedings of University of Lesotho Students Disciplinary Committee, and in addition, what I heard people referring to as the "Street Law Project". The importance of these activities within the context of my research are discussed in the sections that follow.

a) Classroom Observations

The information obtained from classroom observations was of great assistance in filling up the gaps in my knowledge of, for instance, the law of the procedure and evidence. It helped me to get acquainted with some of the legal concepts relating to procedure and evidence before getting to the field. Such knowledge assisted me to identify and follow-up crucial issues relating to the legal profession and to revise my thinking about legal representation in the courts.

Since time would not allow me to observe lectures for all courses offered in the Faculty, I decided to choose the ones which I thought are directly linked with questions in my research. I attended lectures for three courses namely, Civil Procedure, Criminal Procedure and the Law of Evidence. The observations were mainly dictated by the routine activities of the law students. I attended the lectures with them, frequented the gatherings they had prior to and after the lectures, watching them and listening to their casual conversations about discussions and events which occurred during the lectures. During

such conversations I took the advantage of having informal discussions with the students mainly about such aspects as procedures, rules of evidence and how far they thought these would apply and be understood by the majority of the Basotho people.

In all the three courses, the teaching was almost invariably concentrated on the theoretical dimensions of the new rules of procedure and evidence; especially as they should be applied in the received law courts. This was obvious from the cases selected for discussion - none came from the customary law courts; perhaps due to the fact that record-keeping in these courts is very poor, but also because their judgements are hardly ever published. The training in customary law and procedures is almost totally neglected, the focus as indicated above being placed only on the received law and principles of procedure and evidence.

During the time I carried out the observations, no mention was ever made of the customary law courts. Except in the Criminal Procedure class, where it was discussed that legal practitioners have no right of audience in the Central and Local Courts in civil matters. In Civil Procedure and Evidence classes the tendency seemed to be emphasising the point that there has been a move away from the inquisitorial to the adversarial principles.

The tendency was also to lecture about the procedures and rules of evidence as they are in the books, making no reference at all to the complications which arise in the

application of these procedures and rules of evidence. One got the impression that no difficulties are encountered in the implementation. For instance, it was never considered that the personnel in the customary law courts is not professionally trained, and therefore, not acquainted with the adversarial procedures and rules of evidence. This was so even in the consideration of criminal procedure, in which legal practitioners can appear before the Central and Local Courts.

This bias in the teaching of law perhaps explains the observations I made and the information obtained from the interviews, that while it is claimed that criminal procedure is the same in both the customary and received law courts, in practice this is not obvious in the former. Also while the legal practitioners do have a right of audience in the former courts in criminal cases they seldom appear.

In more general terms, what the observations under this section revealed is that, while in practice there are courts exercising powers and applying the customary and the received law, graduates from the University are barely equipped with the customary law procedures and rules of evidence. This, of course, is to a large extent with the exception of a few who come to the University through the recommendation of the Ministry of Justice, and have normally worked in the courts, mainly the customary ones; as clerks of court and/or court presidents, and thus already have some basic acquaintance with the customary law

principles. The full implications of this on the functioning of the courts are dealt with in the subsequent chapters.

b) The Students Disciplinary Committee

The Students Disciplinary Committee deals with such matters as discipline and disputes within the Students' Union. It is not a court of law but exercises tremendous powers such as rustivating a student from the University for a set period of time, imposing a fine, etc. The members of the Committee include the Staff members and members of the Students' Representative Council. During the term of my fieldwork when I had the opportunity to observe some of the Committee's proceedings, the "judge" and the "prosecutor" were staff members. The senior law students normally appear as "defence counsels" for the students against whom the proceedings have been instituted, which gives them a good chance for practising what they have learned in class.

The procedures and rules of evidence used in this Committee follow the pattern very close to that used in the received law courts. During the period of my research there were a number of cases going on before the Committee.

The observations of its proceedings enabled me to see some of the law students in "practice". It also gave me an opportunity to see how the University students cope and understand the court procedures and rules of evidence, representing as it is, a group of people who have a higher

standard of education, and having a fair exposure and knowledge about the principles of the new judicial structures.

The observations focused on items similar to those studied in the courts of the country such as those relating to examination, use of the English language in conducting the proceedings, understanding of what is going on by those concerned "parties", and so on. The intention was to compare and contrast findings from these proceedings with those obtained from the courts of the land; whether they would reveal similar or different trends about the people's understanding and ability to handle the received law rules.

The proceedings of this committee are conducted in English. While one would have presumed that this would pose no major problems for the University students, it was amazing to find out that most of them had a lot of difficulties, for instance, in expressing themselves adequately during examination. The question raised in my mind was that this must be more difficult for those members of the general public who are not even educated to this extent and thus have a limited knowledge of English than the University students.

Usually these proceedings attracted a large attendance from the students. Some of the participants would be standing; leaving no room whatsoever for easy movement, a factor I did not find in the customary or received law courts except on Motion Roll days - on Mondays in the High Court and on Fridays in the Maseru Magistrates' Courts.

In action and trial proceedings, the courts are often not full, those in attendance besides the parties, counsels and the bench and other court personnel, being relatives of the parties and few other people, usually those awaiting proceedings of their own cases.

c) **The "Street Law Project"**

Another interesting activity which I came across during the term of my fieldwork, was what I heard people referring to as the "Street Law Project". Basically the project is concerned with laying the ground for the introduction of law as a subject in the High Schools of Lesotho.

I do not have the full details as to the background of this project - how it started, the need that prompted it, its final aim, etc. Also how the High schools came to be identified as the point of focus for the project; is not clear to me. In ^{my} opinion, the majority of the people in the country need legal training or information about most aspects of the law including the rules of procedure and evidence. They need to be informed of their rights under the law; and so on.

While I was on fieldwork "mock trials" were organised in the High Court as part of the project, in which certain High schools were in competition. The preparations for the "mock trials" had been done with the cooperations and in collaboration with the staff in these selected schools, and some lawyers had also been involved; providing

training in preparation for the competitions. It seemed a very big occasion, and it even formed part of the news broadcast over the national radio station.

On the day of the "mock trials" some members of the court personnel were present including some of the private lawyers and public prosecutors. The High School students appeared in everything - as registrars (clerks) of court, prosecutors, defence lawyers, messengers of the court, including interpreters, etc. Those who acted as prosecutors, defence counsels and the registrars were robed. Presiding over the proceedings were the judges of the High Court, three of them in all, sitting in separate court rooms, and they were also robed. Proceedings took the normal approach of the proper courts and were in English.

While I disagreed with the approach of teaching the law through court proceedings, interesting things were observed, indicating that the majority of people in the country do not understand the new procedures and rules of evidence. As mentioned earlier, it was a big day, the students, in particular took the event very seriously. During the lunch break when proceedings in one of the courts had not been stopped, one lawyer complained: "Judge X is taking these proceedings too seriously, these children ought to go for a lunch break". They would have to reassemble for the finals in the afternoon. Some examples of observations made on this day are used later on.

PROBLEMS ENCOUNTERED

Finances were the main problem in carrying out the study. This tended to ultimately influence both the sample of the courts in which I carried the observations and also the choice of the people selected for the interviews. Hence the fieldwork tended to concentrate on nearby areas, mainly Maseru.

I got an opportunity, however, to go to Quthing, a district in the south of Lesotho. I made court-room observations in the Judicial Commissioners' court and the Magistrates' courts as well. Endeavours to visit Thaba-Tseka, in the mountain areas, were delayed due to lack of financial support for the research. By the time I got some funds, I was already busy in the courts of Maseru and had many activities and appointments already scheduled. Going to Thaba-Tseka during the summer months as planned, was thus impossible. The weather conditions of the winter ultimately made it impossible to travel there. The last attempts, made in August, 1987, also failed due to the snow which fell unexpectedly. On one of these attempts, I was returned from the airport, there were going to be no flights to Thaba-Tseka for an estimated time of a week, when efforts to clear the snow from the runway were complete.

Another major problem encountered, as discussed earlier on, was that no permission was granted by the Ministry of Interior and Chieftainship Affairs, to enable me to carryout observations in the "unofficial" chiefs'

courts. Thus entering the villages as a researcher was rendered a risky business in the circumstances. The problems of entering the villages under disguise were also mentioned earlier. With an additional element; of time running out, the alternative of obtaining detailed descriptions about the nature and conduct of proceedings in these courts, was finally settled upon. The data collected through this strategy consists of descriptions provided by the chiefs. Despite indications of the scepticism and reluctance by the chiefs to admit that their courts do, from time to time, deal with some criminal offences, the rest of their descriptions compare well with other information obtained from other interviews and the literature. Many of the personnel in the official courts, made strong indications that the chiefs do handle matters which, under the strict interpretation of the law, could be defined as criminal. The best examples here would be "fights" involving children, women, herd boys, boys in circumcision schools, most of which are often hardly reported to the police. The value of these indications for purposes of the thesis cannot be disregarded, as this shall be indicated later.

CONCLUSION

The type and variety of data collected during the fieldwork proves sufficient for the purposes of my thesis.

The items of evidence used for the descriptions in the thesis consist of statements from interviews with various

groups of people who were under study, about the events relating to how the courts function, and about what they feel about the manner the proceedings in various courts are carried out. Such statements cannot be taken at face value of course, nor can they, on the other hand, be dismissed as valueless. Careful screening of all the information obtained has been undertaken.

Many of the items of the evidence also come from volunteered statements from various people about themselves or others, or about something which occurred during the proceedings. Some were general comments made spontaneously about how the courts operate in administering justice. A lot of these were collected from casual conversations the participants had with one another following the proceedings, or from intimate discussions held with the informants.

The credibility of the informants and the respondent groups was ascertained, and there is no reason to believe they were made to conceal anything, or to lie about the prevailing situation as to how the courts operate, and the people's understanding and appreciation of the new procedures and rules of evidence. For instance, there is no cause to believe that the legal practitioners nor any of the court personnel had any reason to mis-state their role or perceptions about the operations of the courts. Even the interviews statements of those parties in custody about events of their trials could not be so seriously defective.

Precaution has been taken to report mainly about those

events, which by virtue of their recurrence during courtroom observations, appear to be common phenomena in the practice of the courts. The facts from the interviews got the concurrence of two, and in most cases, more informants or respondents. With the discussions already made of how the data was collected, I believe the descriptions contained in the thesis are valid. An attempt is made to use the data in such a way as to enable the reader to understand the basis on which I have arrived at certain descriptions and conclusions. In doing so, the data is presented in a shorter form than the voluminous pages of the field notes. Where translations of interviews have been made, I have tried to quote the statements from the respondents as close as possible.

Unlike quantitative data, the data of participant observation, which are qualitative, do not render themselves to ready and easy summary. Different kinds of observations which seem to bear on the same points as those obtained from the interviews are brought together. It has not been possible though, to bring out what the entire body of data gathered shows - it is clearly out of question that I could possibly publish all the data gathered.

CHAPTER 2

THE HISTORY AND DEVELOPMENT OF THE PRESENT JUDICIAL SYSTEM IN LESOTHO

This Chapter is both a historical analysis of the emergence of the mechanisms of dispute settlement in Lesotho and of the system of courts as they operate today. Attention is focused on those events which mark important historical moments in the development of the present legal and judicial structures.¹ To do this I have relied mainly on written sources, (Burman, 1985, Machobane, 1985; Palmer and Poulter, 1972; etc.) dealing with legal and judicial developments in Lesotho.

The main argument is that the Basotho, from times immemorial, had their own indigenous mechanisms of dispute settlement, but that with colonial domination these were drastically altered and transformed, and a new system of courts² was introduced which rendered the indigenous institutions³ illegal. These institutions,⁴ while outlawed have, however, never disappeared but continue to operate unofficially outside the constitutionally recognised, official system of courts (the customary courts and the received law courts). The contention is that we are not dealing here, with a dual system of law and courts as so often depicted in the existing literature, but rather with a much more complex set of structures, and that the roots

of this lie in the period during which Lesotho was under colonial rule. The judicial system which was established during that time, has for all intents and purposes, been maintained, even after attainment of Independence.

Unravelling the development of the judicial system of Lesotho is rather a complex task. The exercise cannot be easily separated from the consideration of the broad legal changes and administrative reforms introduced during the period when Lesotho was under British protection, including its experience while under the Cape Colony rule. A discussion of the legal provisions⁵ which sought to bring radical changes into the indigenous system of the Basotho is required, showing how far these changes resulted in the complex judicial system prevailing in Lesotho today. A detailed description of the characteristics of each set of courts and how they operate is, however, left to the next three chapters.

The present chapter begins with a brief analysis of how Lesotho came under British protection and of the relationships that existed between the indigenous government and the colonial administration during that period. These relationships continued up to the time of independence when Lesotho obtained Responsible Government in October 1966.

LESOTHO UNDER BRITISH RULE (1868-1870).

The nineteenth century feuds between the Basotho and the Boers of South Africa were accompanied by pleas for protection by the British by Moshoeshoe, the first king and founder of the Basotho nation. This was during the years 1842 and 1868 (Palmer and Poulter, 1972).

Following Moshoeshoe's initial request for protection in 1842 - he had become an ally of the Cape Government in 1843 - the British Government in 1848 declared sovereignty over Lesotho and other territories North of the Orange River, including those that were occupied by the Boers of the Orange Free State. However, in the case of the latter, the claim to sovereignty was withdrawn in 1854. This left the Boers independent, and Moshoeshoe and his people facing them alone (Palmer and Poulter, 1972). It was only four years later in 1858, when the Boers commenced attacks on the Basotho and were defeated, that the Boers sued for peace. Later between 1865 and 1868, in the Second Free State War they reversed their fortunes and reduced the Basotho to desperate straits. By then, as Burman (1985) states, the danger of disintegration for the Basotho nation was real. It was then that the British took action to protect the Basotho.

Lesotho thus became a British colony on March 12, 1868. When the British took Lesotho under their protection through Moshoeshoe's persuasion, they did so reluctantly, since from the onset their determination had

been that the territory should be annexed to some other British colony in the region (Burman 1985). Since that time, the constitutional role of the chiefs and the relationships between the indigenous government and the colonial administration has been a confused affair (Machobane, 1985). Nevertheless, Palmer and Poulter (1972) argue that, on the advice of Sir P. Wodehouse, the High Commissioner in the Cape, the Crown declared by a Proclamation of March 12, 1868, that Lesotho was a British Territory; a statement which Sir Wodehouse was requested to qualify, by Moshoeshoe and his Grand Council, on April 21 of the same year. Wodehouse did not put his response in writing at that time, since he left South Africa in May.

His statement that followed later, seems to have accepted the arrangement proposed by Moshoeshoe in 1862 in one of his efforts to seek British protection.⁶ Sir Wodehouse's statement was made after the Gun War (1880-81) by which time he had retired. He was asked whether he had intended 'Basutoland for the Basuto only'; Wodehouse replied:

I can only reply, that such was the very thing to the attainment of which all my efforts were directed - it was for the purpose of putting an end to the Border disputes, and for removing doubts as to the true limits of the Territory to which the claim that Tribe, and that alone, should be admitted for the future, that these ... negotiations were carried on ... The object was to secure peace and comfort for the Basutos in the future ... (quoted in Machobane, 1985: 4).

As Machobane (1985) argues, according to constitutional convention Lesotho had thus become a crown colony by cessation, this meaning that Moshoeshoe's crown and that of his heirs had been ceded and that the British crown had thereafter total control over the Territory. In practice, however, in Lesotho the original political structure and its leadership as known to the Basotho, for all intents and purposes, "continued to rule as it had in the pre-colonial era" (Machobane, 1985: 3). It is this confusion in the constitutional status of Lesotho, as shall be argued below, that made it possible for the indigenous structures to persist and function independently, despite consistent attempts by the colonial power to introduce a new legal order and system for the settlement of disputes.

This situation was further facilitated by the British Government's desire to annex Lesotho to some other British Territory in the region. According to Burman (1985) for a while no such arrangements were possible as there was little money available to spend on Lesotho's administration. The British solution was to leave the Basotho to rule themselves so far as the mid-Victorian Christian conscience would allow, and to ensure that the people of Lesotho paid for any costs incurred. This ran counter to the idea then prevalent in Britain and South Africa, that it was a Christian duty to introduce Africans to the benefits of "civilized laws and values" (Burman, 1985: 26).

A similar point is expressed by Hamnett (1970). He argues that the Territory was never supposed to remain a British colony permanently; the expectation was that at some later date it would be merged or incorporated into what later became the Union of South Africa. Hence, until just before the outbreak of the Second World War, there was only minimal Government intervention, and no effort was made to develop the country economically or to prepare it for any other destiny than as part of the Union, now known as the Republic of South Africa. This period aided the indigenous dispute settlement system, by allowing it to continue functioning independently of the colonial administration. This suited the Basotho as they saw themselves as requiring only protection and not domination by a foreign power.

The uncertainty about the constitutional status of Lesotho continued, not only among the Basotho alone, but also among the British, and this is obvious from some of the official correspondence. In his correspondence dated April 21, 1868 to Sir Wodehouse, Moshoeshoe requested that Lesotho should be treated as a "Special Territory" which he had described as:

A Native reserve where natives alone should be allowed to dwell and which would be dependent from the High Commissioner. (Cited in Machobane, 1985 : 3).

It seems all that Moshoeshoe had wanted was protection from Boer attacks, while maintaining his Sovereignty as he

had proposed to the High Commissioner. For example, in 1862, when Sir Wodehouse had sent Messrs. Burnet and Orpen to ascertain his real intentions, Moshoeshoe clearly indicated that he did not want the Colonial Government to send its magistrates, as the Basotho would not accept their presence or understand their role. He wrote:

... what I desire is that the Queen should send a man to live with me, who will be her ear and eye, and also her hand to work with me in political matters. He will protect the Basuto and gradually teach them to hear magistrates while he is helping me in political matters ... (Theal 1883-1964 : 143).

And he continued:

If I obtain an agent he will be under the Queen as her subject and my people will be her subjects, but under me ... I wish to govern my people by Native Law, by our laws, but if the Queen after this wishes to introduce other laws into my country I would be willing, but I should wish such laws to be submitted to the Council of the Basuto; and when they are accepted by my Council, I will send to the Queen and inform her that they have become law (Theal 1883-1964 : 144).

As Pim (1935) commented, these words of Moshoeshoe might seem to be ancient history, but they represent the feeling of the Basotho chiefs and probably also of a large majority of the Basotho people. As will be shown later on, these words of Moshoeshoe were invoked time and time again at various points in the history of the Basotho, particularly when conflict arose between them and the Colonial Administration. This indicates how strongly they

held to these words, but even further, the words demonstrated that the Basotho believed they had always ruled themselves according to their customs and laws. It is contended that, this belief also partly contributed to the adherence to the indigenous judicial mechanisms during the colonial period and even today.

In Poulter (1972), the above argument is carried further; he argues that the words of the Proclamation of Wodehouse that:

... I do hereby proclaim and declare that from and after the publication hereof, the said Tribe of the Basutos shall be taken to be for all intents and purposes, British subjects: and the Territory of the said Tribe shall be and shall be taken to be British Territory (Proclamation NO.14, 1868).

were never accepted by Moshoeshoe, and have never escaped challenge by many Basotho even in recent times. The Basotho held,⁷ and still hold, that they had requested British protection and not colonisation - a contention which affected their relations with the British Administration right up to independence in 1966.

This argument was reiterated in an interview with one of my key informants⁸ who held that the British Administration only came to Lesotho to assist Moshoeshoe in the administration and government of his people. According to him, the British had only been requested to provide protection for the Basotho, while at the same time guiding them to build up their own internal government in

accordance with their own customs. The idea was not for the British to introduce a new system of government among the Basotho. The British, in his view, maintained this path from 1868, and things only started to take a new turn in 1871, when Lesotho was given over to the Cape.

As mentioned earlier, the whole issue of the constitutional status of Lesotho was not clear to the British either. In May, 1868, the British Crown Law Officers expressed the opinion, that on a strict interpretation of the law, Lesotho had not yet become a British dominion and that its cession would be valid if it was "duly authorised by the Queen and recognised by his [High Commissioner] creation as Governor or in some like manner" (Machobane, 1985: 3). Therefore, it may be said that until Lesotho was annexed by an Act to the Cape of Good Hope Colony in 1871, in legal terms, the British rule over Lesotho was questionable. Palmer and Poulter (1972) point out that the annexation was put through without prior consultation with the Basotho. By this time Moshoeshoe had died in 1870 and was succeeded by his son Letsie I. In agreement with Palmer and Poulter (1972) above, Maope (1985) also notes that the annexation had been effected without prior consent from the inhabitants, and further points out that there was a lot of discontent with Cape rule. According to Hamnett (1970), the prospect of annexation had been resisted even before the post-World War II government of the Union of South Africa adopted policies

that made the incorporation totally unacceptable to the Basotho.

The main source of this discontent originated in a reaction to the memorandum drafted by Emile Rolland, a French Protestant missionary, and forwarded to Wodehouse in 1868. As pointed out by Bereng, an informant, Rolland was the son of one of Moshoeshoe's first missionaries. He had grown up in the country and his analysis of Lesotho society came to be crucial in shaping government policy for the Territory in the years that followed. As discussed in Mokoma (1984/85), the main thrust of Rolland's memorandum called for the destruction of the power of the chiefs, which he saw as a source of their wealth and authority. He recommended that, the chiefs' power must be diminished in order for British authority to supercede that of the chiefs. This he contended would create conducive conditions for the future domination of British laws and culture.

Rolland's ideas about change began with the assumption that some magisterial control should be instituted. He argued that the power of the chiefs was the main obstacle to rendering the Basotho subject British law. In his words, the Chiefs' power, "was a major obstacle to Her Majesty's rule in Lesotho".⁹ The aim of the Government would, therefore, have to be, to diminish this power in a way that would not embitter the prejudices of the people (Basotho).¹⁰

The regulations drafted by Wodehouse before his retirement embodied many of the ideas expressed in Rolland's memorandum; and these were publicised at the meeting of chiefs and headmen where Moshoeshoes's death was announced. These regulations, while declaring only a few aspects of customary law illegal, indirectly attacked the chiefs' power and contained a number of measures favouring Roman-Dutch law principles which conflicted with aspects of customary law on which the chiefs relied for income and/or patronage. The regulations undermined the validity and existence of indigenous laws and the chiefs' courts. For instance, the chiefs were not to be allowed to enforce their judgements, and a suitor was provided with the channels for bringing the same case to a magistrate on appeal from a chiefs' court.

Burman (1985) further points out that, as an indication of what was in store in the future, the regulations also contained a provision which looked forward to the annexation of Lesotho to the Cape Colony (a British Possession in the region) which was about to obtain control of its own affairs under a form of Responsible Government:-

a blanket clause provided that all acts which were offences in Cape law were to be punishable in Lesotho as well, subject to the special circumstances of the country.

The Roman-Dutch law principles operating in the Cape, had clearly been introduced in Lesotho from that moment, although recognition was also given to Lesotho customary

law. This was, later on, to affect the organisation and manner in which the courts worked and disputes settled.

In the meantime there had been serious feuds between Letsie, Moshoeshoe's heir and his two most powerful brothers, Molapo and Masopha, over whom he seemed to have little influence and control.¹¹ When the above regulations came to be read out at a national meeting in December 1870, they aroused heated protests. The brothers of Letsie openly objected, one ground for their objection being that the regulations ignored the chiefs. It was only on Letsie's insistence that the regulations were accepted, and vocal opposition halted. Failing to realize the strength of the feelings against the regulations, and the opposition that the magistrates would encounter as a result of such feelings, the new High Commissioner Sir Henry Barkly set about arranging the Annexation of Lesotho to the Cape.

LESOTHO UNDER ANNEXATION (1871-1880).

The Cape reluctantly accepted the annexation arrangement, and decided to accept the British rules of December 1870, although these were contrary to all previous Cape policy in administering African territories (Burman, 1985). With the distance between Cape Town and Lesotho, there was, perhaps, little incentive for the Cape to insist on the full-scale introduction of the Roman-Dutch law.

As Bennett (1985) points out, the Basotho were not enthusiastic about the prospect of being governed by the

Cape either, as this is revealed in the descriptions that follow. The relations on the two sides of the annexation arrangement were marked by hostility, and thus made it impossible for the Cape Administration to rule the Basotho and to enforce magisterial domination.

In addition to the legal arrangements mentioned above, the Cape revealed its lack of interest in the Territory through the total absence of budgetary provisions for public works, buildings, education or postal communications. It had no interest in developing Lesotho beyond meeting the demands of the humanitarians and missionaries. The new system of rule was to be implemented through an imperial officer who was to apply regulations that made many "civilizing" innovations, but would still at least recognise most aspects of customary law and require much less enforcement than the alien law of the Cape (Burman, 1985).

In this manner Burman (1985) argues, the annexation vested the duty of legislating for the Territory in the Governor, who was to lay all legislative enactments before the Cape Parliament within fourteen days of the opening of the session; and unless altered, the enactments would remain in force. No parliamentary act could apply to the Territory unless expressly stated to do so in the act itself or in a proclamation by the Governor. After the Annexation Act became law, the new regulations were proclaimed as the "Governor's Code", and came into force on

1 December 1871. As one informant commented, the Basotho were very dissatisfied by this "handing-down" of laws.¹²

Burman (1976) notes that the 1871 regulations were contrary to the traditional laws of Basotho in a number of ways. The following sections from the "Courts of Law" title can be given as examples demonstrating the changes introduced: the establishment of the magistrates' courts in opposition to the indigenous courts of chiefs; powers of chiefs to try cases and enforce their judgements were interfered with; Capital offences were introduced; whipping, imprisonment, deportation, - which up till then were unknown as forms of punishment - were introduced, etc.

As pointed out in Poulter (1972), the overall attitude towards these regulations was one of resentment, and they were simply disobeyed with impunity in many instances and their enforcement proved beyond the power of the Government's Agent, the Chiefs continued to act independent of the colonial administration.

The history of this period of Lesotho's annexation to the Cape, is marked by problems in the endeavour of the Cape Government to administer it. The Department of Native Affairs, set up when the Cape Colony formally received Responsible Government in 1872, remained relatively small and increasingly overworked, with delays in answering letters growing ever longer. As a result, the men in Lesotho - actually in charge of administering the country - had a great deal of discretion until 1879,

when a change of government and policy in Cape Town, was to leave a permanent mark on Lesotho (Burman, 1985). According to Mohapeloa (1977), what the Cape attempted in governing Lesotho was to introduce direct rule. That is, the replacement of the chiefs' authority with that of the Resident Magistrates, a system which the former complained about from the beginning.¹³ This rule broke down as a result of the Gun War (Crawford, 1969) as shall be illustrated later on.

Under the Cape, Lesotho was divided into four districts, with each of the three major chiefs residing in one, the districts were also placed under the jurisdiction of the magistrates, who were answerable to the Governor's Agent. A few years later, some of the districts were further sub-divided; but the size of the administration remained small. At this time it was headed by Charles Duncan Griffith, as the Governor's Agent, who apparently proved to be a most impressive administrator, who both liked and respected the Basotho, and his feelings were clearly reciprocated. He and the magistrates assisting him were sceptical of the missionaries' claim that good could come from rapid abolition of Sesotho customs, and they, as a result, did not push the pace of legal change in Lesotho as the missionaries would have liked.

As expressed by two of the informants¹⁴ interviewed, the Cape's approach towards governing Lesotho, was contrary to the original agreement between Moshoeshoe and the

British. The Cape hurried into introducing districts, making the magistrates responsible in each of them to govern the affairs of Basotho, without even making the people understand the system of magisterial rule first, as Moshoeshoe had envisaged would be necessary. The Cape had introduced magisterial rule in other territories responsible under them such as the Transkei, and had hoped that it would also work in Lesotho. As ^{it} emerged from interviews with Bereng¹⁵ and Damane,¹⁶ the British themselves, had not appointed magistrates when they gave Lesotho over to the Cape in 1871.

The magistrates' and missionaries' ultimate aim, differed only on the desirable speed and method of abolishing Sesotho customs and law. The chiefs not unnaturally did all they could, to counteract this threat wherever they detected it; but such moves at abolition met with reinforced determination, from the colonial administration's part, to undermine the chiefs' power even further.

The magistrates' manoeuvres tended to be in the interest of the Paramount Chief, Letsie, from whom they had little to fear. A particularly wary eye was kept on his two younger brothers by Moshoeshoe's first wife. These brothers seemed to have a dislike of government policies which could result in a national revolt if care was not exercised. Masopha, in particular, came into conflict with the Government shortly after its arrival and this

continued throughout the period of Cape rule. Later on, the conflict turned out not to be in the interests of Lerotholi, Letsie's eldest son and heir, to join in the anti-Government plot unless he felt very sure of its success and of its support by the people. Government policy turned towards employing the junior chiefs where possible, thus firmly tying their interests to those of the Government. At the same time, the magistrates exercised extreme caution not to give the major chiefs any unnecessary cause for grievance against the Government that might, despite other interests, drive them into Masopha's arms.¹⁷ It is pointed in the literature, for example in Burman (1976) that, by careful manipulation of divisions among the chiefs, the magistrates did succeed in obtaining some good measure of cooperation from the Basotho, enabling the former to enforce the regulations - but it did not completely suppress feelings of dissatisfaction with changes that were being introduced into Lesotho custom and law.

Closely associated with the Government's policy of dividing chiefs was that of weaning their people away from them.¹⁸ As long as this proceeded carefully and successfully, the danger of revolt led by chiefs continued to diminish. Simultaneously, however, the magistrates were attempting to push through a number of unwelcome changes into the daily life of Basotho people, but in doing so, they required a good judgement of what changes in

Sesotho law would be tolerated by the people, in return for such advantages as Government protection from unwelcome impositions by the chiefs. Every means was adopted to take over various ways with which the chiefs had contact with the people, from the custom of holding national meetings (pitsos) to discuss laws, to encouraging migrant labour, christianity and education, and a number of ways were employed to introduce the people to the money economy and its individualistic values.

When the Governor's Agent, Griffith, introduced the Basutoland Mounted Police Force in 1872, it was to give greater weight to magistrates arguments that the Government provided a more effective way of settling disputes than the chiefs did, forbidden as the latter were, from enforcing their judgements. The Government was in a favourable position to enforce its decisions, and commoners benefited by being able to defy their chiefs on certain issues with effective Government support. Within the courts a flexible approach towards Cape rules of evidence did much to decrease the people's feeling of unfamiliarity with the new court procedures. Burman (1985) argues that, within seven years, the Government successfully won enough support from the people to be settling most of their cases, despite initial opposition from the chiefs. This, she adds, at first gave rise to suspicion that perhaps the magistrates were not enforcing those aspects of the regulations most unpopular with either the chiefs or people, which included

a lot of the imported Roman-Dutch Law principles.

Such a success story led to the decision to extend the scope of the regulations. In 1872, Griffith set up a Special Commission under his chairmanship, to inquire into and report upon the laws and customs of the Basotho, and on the operation of the regulations established for their government. The other members of the Commission consisted of the magistrates. The Commission produced its report and a redrafted version of the regulations in 1873. After four years of further drafting and redrafting, an amended version of the regulations was eventually proclaimed on 1 July 1877.¹⁹

Of the various innovations contained in the final version, the most radical change was that which, for the first time, made provision for the Cape law to apply to the white section of the population in Lesotho - as the law had stood up to that time, it was illegal to do so, yet, on the other hand, it was inconceivable that customary law should have been applied by a white magistrate in a dispute between two white men. The new regulations, however, provided that Cape law was to apply except where all parties in the case "are what are commonly called Natives, in which case it may be dealt with according to Native law."²⁰ Thus in disputes between white men and Basotho, Cape law would apply. As it was further provided, the relevant section stated that:

the proceedings shall, as near as may be, and so far as circumstances will

permit, be the same as those in the Courts of Resident Magistrates in the Cape Colony.²¹

A fair amount of discretion was thereby allowed to the magistrates as to how rigidly to apply colonial procedure. The regulations of 1877, remain the original source of the introduction of more than one system of law into Lesotho (Cf Burman, 1985).

What this meant in practical terms is that the received law came to apply to all inhabitants, while in addition, the indigenous law was to apply to the Basotho. The same position continues today. As Maope (1986) has pointed out, this type of distinction based on ethnic origin is still not prohibited.²²

The transformations introduced so suddenly into the society for religious, economic and legal reasons, generated considerable unease and discontent among the people, who up to that point had known no other system of law and administration of justice except their own. The regulations are believed,²³ to have been a direct cause of the rebellion by Moorosi and his sons. As a result of a further sub-division of one of the larger districts in 1877, a magistracy was established in Moorosi's district. Clashes occurred between him and his magistrate over the application of the regulations. A full-scale revolt culminated which led to the killing of the chief, Moorosi, and all of his principal sons, together with many other people under him. This revolt is only an indication of

the delicacy of the balance upon which the whole system of the magistracy was built. As pointed out by Bereng (informant), Moorosi was resisting magisterial rule and defending his own independence.

The Sprigg Ministry that followed, continued on these lines to undermine the power of the chiefs and replace Sesotho law and institutions with colonial ones. The previous Government, however, had proceeded much more cautiously in this endeavour: customary law and the chiefs were undermined when and where chance arose. It was envisaged as a gradual process which would take many decades of slow steady loosening of traditional bonds. Sprigg, on the other hand, came with a new approach of "vigour" with changes to be introduced immediately when ordered by the Ministry in Cape Town. It was this increase in pace, as against a strategy combining patient whittling away of chiefly powers and improvising on opportunities, which in combination with a disarmament policy, speeded the process towards the disannexation of Lesotho from the Cape following the Gun War.

THE WAR OF GUNS (1880-1881).

The 1878 Peace Preservation Act which set out to disarm the Basotho and other nations in the region, was the last stage in the Cape's rule over Lesotho. As stated in Burman (1985), the Act was partly a consequence of a scheme of Sir Battle Frere, the Cape Governor since 1877, to

confederate the South African territories, for the success of which he believed disarmament was an essential prerequisite. Jones (1951) described the decision to disarm the Basotho as a misguided attempt.²⁴ Bereng (informant) claims that the disarmament policy was intended to make the black (my underlining) peoples responsible to the Cape, hand over their guns to the government.

Gun buying had increased in the immediately preceding years, funded by the wages earned by migrant workers at the diamond fields in South Africa. From the minutes of the meeting enclosed by the Governor's Agent in his letter to the Secretary for Native Affairs dated 14 July 1880, it is evident how strongly the Basotho objected to the order to disarm them. This meeting had been called by the Chief Letsie, to enable the deputation to report the results of their mission to Cape Town, where they had been sent to present a petition against disarmament, and for the Chief to inform the people about what decision he had reached with regard to the surrendering the arms. The Governor's Agent had intimated in his letter mentioned above, that, in his opinion, the Basotho were adverse to surrendering their arms and did not intend to do so.

The Basotho finally interpreted the disarmament policy as a sign of the Cape Administration's mistrust in them. Their chiefs' deputation to Cape Town, had not been permitted to argue their case before Parliament (Burman, 1976). For the Basotho, no argument from Government or

missionaries could overshadow the combined force of the considerations that they needed the guns for their own protection against the Boers of the Orange Free State, should the Cape ever abandon them, as the British had done in 1854 (Burman, 1985). The dissatisfaction aroused by the disarmament legislation was intense and culminated into the Gun War.

Sprigg had ignored representations made from various quarters - the Governor's Agent, magistrates, missionaries, traders - and pushed ahead with his scheme, this antagonized most Basotho. Their long-standing grievances over the effects of the regulations on the chiefs' customary powers spearheaded the people behind them (Burman, 1985). Due to old age, ill-health and other factors, Letsie himself, was unwilling to lead a revolt and, therefore, did all in his power to avert armed resistance, hence the delegation to take a petition to the Cape Government. Its rejection led to mounting dissatisfaction among the Basotho, Masopha held a strong position, leading the opposition to surrendering the guns, joined by Lerotholi (Letsie's heir) who wanted to retain his paramountcy.

As pointed in Burman (1985) the people had split into "rebels" and "loyals"; the latter consisting of nearly all Christians, although some Christians did join the rebels against Government policy. Magisterial authority gradually collapsed as the actions of the "rebels"

intensified. The inevitable outbreak of the war came in September, 1880, when Lerotholi attacked a column of Cape Mounted Rifles who had crossed the border to garrison the magistracy of his district. The Gun War had begun, and it marked the end of the magistrates' carefully constructed network of trust and interests, which had enabled them to impose their new legal ideas, despite widespread - and, in the case of Chiefs, strong - opposition to the regulations. The Cape's ability to control Lesotho had come to an end (Burman, 1985) and its power had collapsed; yet the Basotho remained armed.

The Gun War proved more disastrous than even Sprigg had feared, and the heavy expenses that the Cape had to bear, pushed the Cape Government to anxiously negotiate for peace. The terms of their initial offer were, however, unacceptable to the Basotho and hence were rejected. Lerotholi's ill-health and fear of the approaching unfavourable weather conditions, made the Basotho speedily conclude an agreement. Negotiations for peace recommenced on 29 April 1881 and the Governor - accepted as an arbitrator by both sides - announced his Award.²⁵ Masopha refused to submit to the Governor's Award, until he was forced to do so in September 1881. As he continued to act as a focus for dissatisfaction, the people remained unwilling to take their cases to the magistrates. But more importantly, his stand represented continuing refusal to submit to the changes introduced by the Colonial

administration.

So disenchanted did the Basotho become with the Cape Government that they did not welcome even its last desperate offer in 1883 - to leave the management of internal affairs to the Chiefs and to control only external relations. Worse, the Cape Government as pointed out in Jones (1951), had not even been able to protect those Basotho who had remained loyal to it during the war. At the beginning of May 1883, the Cape opened discussions with the British to hand back the country to its care. When arrangements were finally made, the pitso²⁶ was called on 29 December to ask the Basotho if they were willing to be ruled by Britain through the High Commissioner. Letsie, his sons and the majority of the people but, again, not Masopha, replied in the affirmative, and the British accepted the country back under its rule. Until 1886, Masopha is reported to have refused to receive a magistrate in his district²⁷ (Burman, 1985). Bereng, one of my informants, explained that Masopha had refused to accept a magistrate because he could not be convinced that the freedoms and rights of the people would be maintained and promoted - "when the Cape Government left there was still no magistrate in Teyateyaneng".

LESOTHO'S DISANNEXATION FROM THE CAPE AND THE BEGINNING OF PROCLAMATIONS

As discussed earlier, the war had been precipitated by

the decision to disarm the Basotho. The Cape Government, disillusioned by the heavy expense caused by the war, requested the Imperial Government to take charge of the Territory. Lesotho was then accordingly disannexed from the Cape by Act 34 of 1883; following which additional provisions were made for customary law to continue to be administered in cases between Africans by the Chiefs' Courts; a condition in line with the policy of indirect rule.

The British ruled through the Resident Commissioner and revived also, magisterial rule. The former was ultimately responsible to the High Commissioner for South Africa. No significant changes were made, except to give the Chiefs jurisdiction over minor Civil and Criminal cases. Their judgements, however, were to be the subject to review and scrutiny by the Commissioner. As described by Sanders (1985), it was a characteristic feature of the proclamations intended to provide for the introduction of European law as the general law for Lesotho, Botswana, and Swaziland, to also provide for the continuation of indigenous laws and institutions; to the extent that they were compatible with the new order, of course. It is in this sense that Mohapeloa (1977) argues that, the year 1884 marked the beginning of indirect rule in Lesotho.

However, the British Government only took full control of the Territory in 1884 (proclamation 2B of 1884). Poulter (1972) says that the oppressive (my underlining)

regulations were repealed, and the chiefs' courts and their administration of customary law as well as their land allocation powers came to be recognised. In addition, the registration of marriages, introduced by the Cape Government, became optional. According to Bereng, the British were convinced that the Basotho were capable of conducting their own affairs and that their form of government was somewhat democratic, as demonstrated by the practice of holding the pitsos in order to sound public opinion on important issues. Palmer and Poulter (1972) claim that this marked the beginning of proclamations intended to bring change in the form of Government in Lesotho.

The General Law Proclamation of 29 May 1884, is worth nothing for a further reason in that the basic legal structure set out in it, was carried through into independence. However, Burman (1985) argues that the introduction of Roman-Dutch law principles was contained in the regulations first made public at the meeting of December 1871, discussed earlier on.²⁸ By implication, changes actually began prior to 1884. Maqutu (1982) concurs with this, arguing that Roman-Dutch law first became the Common Law of Lesotho when the Basutoland Annexation Act of 1871 introduced the Law of the Cape into Lesotho.

Furthermore, the famous Proclamation 2B of 1884, gave the Resident Commissioner the power to appoint Chiefs:

to adjudicate upon and try such cases, Criminal or civil, and to exercise jurisdiction in such manner and within such limits, as may be defined by any rules established by the authority of the Resident Commissioner, who is hereby empowered to make all such rules as may be necessary in that behalf, and to amend, alter, and cancel the same as he may think fit.²⁹

According to Machobane (1985), if implemented this provision could have brought an end to the parallel³⁰ system of Government. But as he argues further, it was found imprudent to risk another confrontation with the Basotho, so soon after the conclusion of a war. Hence these provisions were shelved and forgotten until 1922, when for the first time the Colonial administration decided to table them again,³¹ this time in response to the pressures from the commoners arising out of among other things, the inadequacies and corruption in the administration of justice. Palmer and Poulter (1972) indicate that in 1922, there was growing dissatisfaction with delays which had become a prominent feature of the Chiefs' Courts. This consequently led to proposals for reform which were placed for discussion before the Basutoland National Council in 1929 (Discussed later). The complaints about such matters as delays encountered in the chiefs' courts, formed a subject of discussion at every session of the Basutoland National Council from its inception throughout its lifetime.

Machobane (1985) indicates that by the end of the

nineteenth century the indigenous Government of the Colonial Lesotho had, for all intents and purposes, broken down. This, he says, was due to the political, economic and social factors³² prevailing at that time. The political factors that followed the Gun War included the feuds or disputes among the chiefs themselves. In Jingo's autobiography, (Perry and Perry, 1975), it is stated that the chiefs were involved in continual squabbles, trying to maintain and enlarge their territories; a problem that could be traced to the fact that there were too many chiefs and virtually no more land on which chiefs could install their children.

The political feuds among the chiefs led to the breaking down of two important institutions of indigenous Government - the Grand Council and the "pitso". The latter had been a singularly democratic institution, where subjects of discussion were brought to the people for them to express their opinions as openly as possible. Part of the reason for its breakdown was that the Colonial Government in the 1870's, had turned it into a forum where they introduced their distinguished guests into the Territory, but in addition, the chiefs had become intolerant of differing views aired by the people (Machobane, 1985).

It is pointed out, for example, in Burman (1976) that the Basotho had become increasingly sceptical about the extent to which they were able to influence policy, for

instance, as regards laws, through the pitso. One Mosotho man is reported to have demanded at the 1875 national pitso:

I want to know what answer the Queen has ever sent to our misgivings at these meetings? And yet I have often heard misgivings expressed but never any answer.³³

The Basotho had come to be deprived of the democratic right to recommend, make, alter or repeal the laws (Mokoma, 1984/85) - a right which they previously exercised through the pitso.

The economic factors that led to the feuds, on the other hand, included the introduction of a compulsory form of "hut tax" (i.e. house tax) by the Cape Colony in 1871. The chiefs and headmen were given the responsibility for tax collection, for which in return they were given allowances. They began to feel increasingly indebted to the colonial administration because of their dependence on these allowances. Subsequently, their political bond with the commoners was proportionally worn out.

The social factors, Machobane (1985) mentions include the introduction of the white man's drink, whisky, and the impact of western civilization and christianity. The chiefs, because they had the money to purchase the white man's drink, were the ones hit hardest, they became drunkards and hence failed to fulfil their official chores including their crucial responsibility over judicial matters. The commoners thus began to complain of the

injustices they were experiencing in the chiefs' courts.

Amidst all the problems, the indigenous government and the colonial government largely operated separately; the former being in full command of the internal administrative affairs involving the Basotho, under the leadership of the chiefs. This state of affairs was commented on later on by Sir Alan Pim, who in 1935, reported³⁴ that from his observations the Colonial Government and the "Native Organisation" still functioned practically independently of each other, there being no attempts to combine the two into one system of government and nor had there been any modifications made to render the Native System capable of dealing with changing social conditions such as the introduction of the money economy. But more than that, the two administrations, in some ways had become even more aloof from one another, to an extent that even the practice of involving a representative of the colonial administration in the boundary disputes among the Basotho chiefs had fallen into disuse.

It is argued, in the literature, that this was not the type of "indirect rule" exercised in other territories under British authority at that time. For example, Sir Donald Cameron is reported to have said the essence of true indirect rule - "the allegiance of a people to a tribal head, freely given and without external cause" - was found in a high degree among the Basotho. This was not "indirect rule" as understood in other parts of Africa -

not only the acceptance and the preservation of recognised tribal institutions "but making the Native Authorities a living part of the machinery of government and directing the political energies and ability of the people to the development of their own institutions" (Pim, 1935). Pim's report pointed to the failure of the colonial administration to provide the necessary control and guidance in Lesotho; and thus ultimately its ineffectiveness in introducing colonial rule. As Pim (1935) described it, the practice in Lesotho presented a different case - it was more a policy of non-interference, of proffering alliance, of leaving two parallel Governments to work in a state of detachment unknown in Tropical Africa. In contrast, under indirect rule, native institutions are incorporated into a single system of government and subjected to continuous guidance, supervision and stimulus of European officers. Under these circumstances Pim (1935) had concluded that there was no rule, direct or indirect by the British Government in Lesotho.³⁵

In reality, just as before colonisation, the chiefs ruled the nation. Machobane (1985) indicates that for as long as there was no conflict of authority the colonial administration emphasized British "protection" in its relations with the indigenous Government. This is supported by Pim (1935) who observed that the colonial government could only provide advice, which was most

welcome only when a difficult issue arose. He, therefore, concluded that the Basotho received protection without control and that this was not only acceptable to the chiefs, but to the masses of the Basotho people as well. The point is that it allowed the indigenous system to go on and the chiefs continued to handle even disputes among their people in the traditional manner.

THE FORMATION OF THE NATIONAL COUNCIL AND THE EVENTS UP TO 1935.

It was at the beginning of the twentieth century that the long standing suggestion by the colonial administration concerning the establishment of a National Council was finally agreed to. Poulter (1972) shows that the earliest proposal to set up this council of chiefs and headmen, as a body meant to give advice to the colonial administration, was put forward by Mr. Scanlan, the Prime Minister of the Cape Colony at the end of the Gun War. The idea was accepted by Letsie I, Moshoeshoe's successor, but many other chiefs rejected it. Machobane (1985) indicates that the chiefs had suspected it to be a potential instrument for their control.

The first Resident Commissioner of Lesotho, Lieutenant Colonel Marshall Clarke had revived the idea in a private letter to Letsie I, after whose death in 1891, the proposal was shelved for the first eight years of the rule of his

successor, Lerotholi. Seventeen years later, in 1903, the idea was finally agreed upon (Poulter, 1972). Machobane (1985) indicates that it was during the Anglo-Boer War 1899-1902 that Lerotholi decided to change his mind about the establishment of a national council. For one, he was considerably ill at that time, but most important, he had realised that his successor, Letsie II, was an exceedingly weak leader due to the white man's drink. Lerotholi was therefore eager to strengthen the position of his successor. Poulter (1972) points out that Lerotholi had reopened the matter concerning a national council again in 1901; apparently, on the advice of an American missionary, Rideout, that such a body would strengthen the power of the chiefs.

Having finally decided to set up the National Council, its first session was ultimately held in July 6, 1903, under the presidency of the then Resident Commissioner, Herbert Sloley (Poulter, 1972). It was at this session that recognition was given to the most pressing problem in the system of indigenous Government - the lack of justice in the courts. The Basutoland National Council(as it was called) saw its first and major task as the codification of customary law (Machobane, 1985). A committee which was duly formed to work on the assignment produced twenty four laws, not all of ancient origin, and these having been deliberated upon for six days were reduced to eighteen and were named after the then Paramount Chief, as the "Laws of

Lerotholi" (Machobane, 1985). These laws were upheld for fifteen years, but by 1918-1919; another set of seven new laws was passed among which were included procedures for the courts; a revised edition of the Laws of Lerotholi was published in 1922 with these new additions (Poulter, 1972).

The membership of the National Council was largely dominated by the chiefs or their representatives appointed by the Paramount Chief himself - there were ninety-four of them out of a total membership of a hundred. Five of these members were the appointees of the Resident Commissioner (Poulter, 1972). Machobane (1985) says the Resident Commissioner's appointees included four commoners.

Despite the encouraging beginning, the Council was not always so ready to voice criticisms of the chiefs to check their abuses. It soon came to reflect the wishes of the chiefs, especially the higher ones in the hierarchy (Poulter, 1972). Conflict of interest arose between the chiefs and the commoner-members and the National Council began to be questioned.

There have been debates about the authority of certain parts of the Laws of Lerotholi, especially Part I. While I do not wish to indulge in a prolonged discussion of whether or not these laws had the force of law, since the National Council had no legislative powers, it is worth noting that the laws were circulated, the first set in Lesotho, as "Memoranda for guidance of the Native Courts and Courts of Appeal". The thinking was that these laws

would serve a useful purpose in establishing a written code for reference where oral tradition alone was insufficient to ensure a proper administration of justice (Poulter, 1972).

Noting the attitudes of the people towards these laws and the Council's perception about them is equally important. Bennett (1986) shows that the Council and the Basotho people regarded even the final compilation of the Laws of Lerotholi as binding law. The Basotho courts or the official customary law courts, still regard them as such, and the people in general attach great importance to them, especially because of strong attitudes, which still prevail towards customary law.³⁶

Ashton (1952), writing about the people's views of the Laws of Lerotholi, indicates that they were viewed as:

...less an authoritative collection of traditional laws than as a definite legislative enactment and several of them ... have gained a currency, as a result of their publication and association with the Basutoland Council that they never had before or are likely to have acquired on their own (Ashton, 1952: 467).

He himself described the laws as "that authoritative compilation". Poulter (1972) points out that the Colonial Government's policy of non-interference had allowed the traditional authorities to believe that they possessed far greater powers of legislation than they actually did. This contributed significantly to the coexistence of various systems, including those for the settlement of

disputes, which is one main theme of this work.

As noted further, for example in Poulter (1972), the National Council believed that they were the only ones who could make laws affecting the administration of justice among the Basotho, a sentiment shared by many members of the Council. In his opening address at the 1928 Council Session, the Paramount Chief, Griffith, reiterated this attitude, and clearly declared that the Government's proposals should be left in the hands of the Council:

who are the mouthpiece of the Nation,
so that the Nation may make its own
laws ... the laws that the Nation will
ask for are the only ones which will
satisfy them (cited in Pim, 1935: 26).

As Bennett (1985) shows, the publication of the revised edition of the Laws of Lerotholi in 1922, heralded a change in the Council's self-conception; they came to regard themselves, not merely as a passive instrument but as the legislative voice of the Basotho people - that was despite the fact that in theory, such power to make the laws was vested in the High Commissioner.

The Pim Report of 1935, contains a quotation from the speech of one Councillor, which expressed the sentiments shared by many members of the Council and spelled out their self-conception most eloquently:

... the Resident Commissioner should
not make Native laws, he should advise
and confirm the Chiefs of Basutoland
who were appointed by God, by birth and
who were confirmed by Queen Victoria
... The subject is surprising, that we
have you making our domestic laws.
Advise and see if it will be rejected

.. Give advice, that is what you are sent here for by the Imperial Government. (Pim, 1935).

Reference had been made at the beginning of the above statement, to the words of Moshoeshoe to Messrs Burnet and Orpen in 1862, and on that basis it was alleged that the British Government, by making the laws for the Basotho, was acting contrary to its previous undertakings and trying to curb the hereditary power of the chiefs.³⁷ This recalled the words of Moshoeshoe, that his request had only been for "protection" in which case the chiefs were the ones to rule the Basotho people and make laws for their government. Further and more important, it was a revelation of the chieftainship and councillors' attitude, as regards the whole question of the legislative power of the Council, contained by implication, also in the Paramount Chief, Griffith's statement on the previous page.

A further opinion can be found in Machobane (1985); he indicated that the Code (i.e. the Laws of Lerotholi) did not resolve the problems of injustice in the Basotho Courts, a fact which was admitted even by the chiefs themselves. The problem of injustice therefore became a repeated topic of discussion in the National Council - but the chiefs, in contrast, were becoming more and more irresponsible in their administration of justice. Prominent among the accusations were delays in the trial of cases. In some courts, chiefs were no longer presiding

over their own courts and there were stories that commoners had to pay bribes for their cases to be brought to trial quickly.

In the meantime, two critical political pressure groups had emerged which were actively pressing for the reforms in the system of Native rule and the administration of justice, on behalf of the commoners. In our discussions, Damane (refer to Appendix F) pointed out that these two groups were determined to fight against the malice of delays in the justice process, and that the people were no longer satisfied with the way in which the administration of justice was being carried out. For instance, he mentioned that complaints were being raised concerning the tradition of matsema³⁸ and lipitso which had been turned into "traps" for bringing to court and fining people who did not comply with their chiefs' orders - people were being fined for not joining in the matsema and for not attending the lipitso. In an interview him Bereng (see Appendix F) confirmed this point, that chiefs were making unreasonable demands on their people, which if not complied with, resulted in people facing innumerable charges for failure to obey their chiefs' directives. Bereng also stated that these included among other things, not complying with orders to attend the "pitsos". As he further noted this prompted complaints that the chiefs had "turned the nation into gold mines", that is, they were enriching themselves by making people face endless charges

for disobedience of the directives and orders.

Recognition should be given to the fact that, the matsema practice had taken a different form from its original one. While in the past the so-called "tsimo-ea-lira" was the one in which the people had to pay service to the chiefs, recent practice had changed into people being ordered to work on the fields of the chiefs' wives, including the most junior ones.³⁹ The Progressive Association (one of the political pressure groups), in particular, raised complaints about this new practice of matsema. As illustrated by one of the informants, Damane, when closely examined, the problems surrounding the matsema practice as described above, were linked to the misuse of the "placing" system, as discussed later on.⁴⁰

The Basutoland Progressive Association was founded in 1907 by Simon Majakathata Phamotse, from the Leribe District. It was mainly an elite group, very western in thinking and among its distinguished members were Thomas Mofolo and Z. Mangoaela, both writers; others were Ministers of the Paris Evangelical Missionary Society, teachers and businessmen. It was more comfortable with the colonial administration than chiefs, a characteristic which made it different from the second group, the "Lekhotla La Bafo". The Progressive Association viewed the chiefs not only as corrupt, but also backward and ignorant (Machobane, 1985). Poulter (1972) points out that this group pressed for reforms in the system of

indigenous rule; and was constantly critical of the administration.

The second group, the Lekhotla La Bafo, "Commoners Council", was founded by Josiel Lefela in 1909, and was comprised mainly of the poorer Basotho, landless migrant workers to South Africa, members of independent churches, disgruntled junior chiefs and a significant number of women. It was clear that chieftainship should be retained and its pre-colonial calibre restored. It made more attacks on the colonial administration and on Imperialism in general and also on the Christian church. Its founder, who had been a member of the National Council was kicked out in 1920 (Machobane, 1985). The Lekhotla La Bafo came to be associated with the eventful years of change in the administration of Lesotho by stirring up conflict, and raising many questions about the chiefs' actions in the interests of the commoners (Perry and Perry, 1975). According to Bereng this group was commonly known as Lekhotla La Sechaba (People's Council) among the Basotho.

While not denying the abuses in the administration of justice, Damane pointed out that the Lekhotla La Bafo was opposed to the practice of paying chiefs salaries, arguing that it would turn them against the nation while strengthening their allegiance to those who paid them. As he further explained, this group was against the new court procedures, which they viewed as diminishing the rules set by custom, as well as changing the role of chieftainship as

an institution with obligations to the society. He also pointed out that, as a result of the reforms denying the chiefs judicial powers and access to fines, chiefs had ceased to provide food to their people at khotla. This was not received well by the people, who then began to question the new system.

On 9 March 1921, the two associations combined efforts and featured an article in a local newspaper "Mochochonono", reacting against Lefela's expulsion from the National Council. The article expressed that:

If the President desired to exercise his authority over the Council which has lain dormant for many years why in all goodness did he not start by suspending thieves, murderers, and law-breakers [chiefs] who constitute a majority of the council? He is pleased to listen to the advice of such outcasts and confer with them in matters of theft, murder and law-breaking, but shuns the society of a man who fights both tooth and nail against such barbarities. ... It is simply scandalous. (cited in Machobane, 1985: 20).

In December of the same year, The Friend, Bloemfontein (South Africa) newspaper featured two aggressive articles against the court system in Lesotho. One complained about the lawlessness of the chiefs, how cases were stockpiled before trials, and how the system of appeals was made impossible with cases often being returned to the courts of first instance. It accused the chiefs of great misuse of the courts. The second article followed two weeks later, written by Simon Majakathata Phamotse. It referred to the

"uneven balance" of justice in the country, and pointed out that chiefs ran the courts with subjectivity and vindictiveness. It urged for reforms and proposed for the establishment of a Department of Justice to be presided over by an "experienced and qualified judge" who would "have nothing to do with political affairs". As Machobane (1985) points out, this was the first suggestion from a Mosotho for the separation of powers in the customary functions of the chiefs. Two more articles followed in local newspapers, Naledi and Mochochonono in February 1922, one of which was by Phomotse again (Machobane, 1985).

As an example of how chiefs abused their powers of administering justice, Bereng pointed to the unfair practice by which chiefs began to fine people who refused to go on errands to far away places on their behalf, and those who did not attend the pitsos. He said, in addition, the headmen made their own demands on the people, and in the same manner fined the people for non-compliance. As a result the nation became very bothered at the manner in which justice had come to be administered. This supports Machobane (1985) in his observation that, the charges against the chiefs had escalated during the third decade of the twentieth century, hence the reports of maladministration of justice began to feature in the newspapers of Lesotho and South Africa. It was in an attempt to attend to these problems, that changes described in the following sections were made.

Following these reports, the Paramount Chief, Griffith Lerotholi convened a huge pitso at the royal residence, Matsieng, whereby Simon Phamotse and his followers were called to speak about their charges. They refused to be cross-examined and said they would only do so in a proper court trial. At the end of that pitso, it was quite evident that Phamotse and colleagues had won, as women of the Paramount Chief's village came to shake hands with him (Machobane, 1985).

It was at that point that the Colonial administration thought seriously about initiating reforms along the lines of Phamotse's proposal for a new judicial body. A modified form of this proposal was for the establishment of a Court of Appeal to deal with appeals against judgements of the chiefs' courts. The Resident Commissioner, however, cautioned:

The suggestion for this innovation should emanate from the nation itself, and not be thrust on them by the Government. I think that a motion introducing the suggestion could be arranged for the next session of the Basutoland council.

He was referring to the 1923 session. Such a suggestion for the nation's participation in decision-making could not be rejected by the Basotho. It was certainly in their interests and conforming to their desires. Griffith, on the other hand, rejected the idea for such a reform, outright, seeing it as undermining the role of his own court in Matsieng. Making a fresh start, the colonial

administration decided to introduce the reforms directly.

The chiefs had by this time accepted their failure to deal with their own administration and the judicial problems and thus welcomed intervention by the Colonial administration. The new Resident Commissioner, J.C.R. Sturrock, set about drafting a lengthy set of regulations in 1927, which were then circulated throughout the country for comments and were to be presented to the National Council in April 1929 before being passed on to the High Commissioner for proclamation (Machobane, 1985). That session, due to some problems, was ultimately convened in October, the same year.

In his opening statement of the Draft Proposals for the New Native Court Regulations, the Resident Commissioner, Sturrock, made it clear that all councillors, except one closely connected with the Paramount Chief's Court, had admitted to the need for improvement in his hearing in Council. He mentioned that the number of chiefs who had the right to exercise judicial powers was both undefined and also too great. This he said, was due to the fact that any son of a chief, who had been "placed" automatically obtained judicial powers. He felt that this practice had to be brought to an end; as Section 4 of the Proclamation 2B of 1884 provided (quoted earlier). He suggested that, in consultation with the Paramount Chief and the National Council, a schedule of chiefs be drawn up and appointed with judicial powers, and that their powers

be defined.

The point about the "placing" system in which the chiefs were giving privileged positions to their sons, is that it led to an increase in the number of authorities, and the numbers of people entitled to hold courts also grew by the day. In the traditional practice each chief had a court that performed both administrative and judicial functions in his area of jurisdiction. In the words of Bereng, one of the British Government officials once remarked:

Their [Basotho] number of chiefs has become an astronomical problem (Bereng: 28.4.1987).

As he further indicated, the increase in the numbers of chiefs and thus their courts as well, meant that the line of appeal grew longer and longer, and this led to the even greater complaints about delays in the administration of justice.

A comment made by Bereng about the system of "placing" stated above, however, is that when the criticisms were being made, it had changed from what it had been during the time of Moshoeshoe. Moshoeshoe had only "placed" his four sons from the "first house" (by his first wife), though the fourth, Majara, died before he could take charge. But as time went on, the sons of Moshoeshoe changed the practice, "placing" all their sons including those from "junior houses" - they had many sons - whom when all were "placed", led to this high numbers of chiefs, as they continued to do

the same. In alluding to the same problem Damane made an example of Matsieng, "the place of chief Letsie", whose first sons by each of his six wives had all been "placed" as chiefs. As he further pointed out, with the increase of chiefs, the courts also multiplied.

The result of this was that numerous delays were caused in the administration of justice. As the system of "placing" continued and some of chiefs from "smaller houses" were given areas over which to rule, it meant the system of appeal from one junior chief's court to that of a senior one immediately above him became more complex. Even at Matsieng there would be numerous courts of chiefs superior to those from where the people came. To show how complex the system had become, Damane said, there were even rumours that people had to bring bags of maize and wheat to feed on, while at Matsieng awaiting their cases to be processed. Further, he showed that bribery thrived as people tried to push for their cases to be heard fast - people were being charged financially for the administration of justice. Certain cases came to receive outmost urgency and priority because of the benefits they would immediately bring to the chiefs. In addition, he mentioned that there were accusations that the chiefs were avoiding the responsibility of discharging their judicial functions and some were accused of conniving in stock theft.

Further, the Resident Commissioner brought up the

question of regularising the procedure in the courts, which he hoped would obviate delays. Section 1 of the Rules of Procedure in the Draft Proposals stipulated that:

The court shall sit for business every working day, and cases shall be arranged so that parties are not kept waiting unduly.

The proposals, in addition, included provisions for records of cases dealt with to be kept, all proceedings were to be taken down in writing and filed. Provision was also made for the fines to be paid into a Native Administration Fund instead of being retained by the court, an innovation not in accordance with ancient Basotho custom as shall be discussed in the next chapter. This suggestion regarding the disposal of fines was made in recognition with the words of High Commissioner, Mr Amery, who had said to the Council once before that some of the customs of the Basotho may not suit the times. The proposed Native Administration Fund was to be in the first instance used to provide salaries for the chiefs who presided over the courts. Further, while traditionally fines were paid in kind, effort was to be made, as soon as possible, to receive payment in cash as in European Courts.

Finally, the conduct of appeal to the Paramount Chief's Court was seen as also needing urgent improvement, in view of serious delays which often occurred in their settlement. Suggestions had been made to establish a circuit court in the 1922 session, and these were revived,

with the caveat that they should not infringe upon the power of the Paramount Chief.

Meantime, the relationships between the Lekhotla La Bafo and the Basutoland Progressive Association had deteriorated. Lefela believed that the latter were politically disoriented and were agents of imperialism. The former had initiated a campaign a few weeks before the Draft Regulations were to be discussed in the National Council, in defence of the chiefs. Lefela argued that Lesotho was a Protectorate and that the Colonial administration had been sent to protect the country, and he was thereby appalled to find that the colonial officers were bent on the:

breaking down of our social fabric to bring about detribalisation of our political existence as a nation ... in the vilification and pollution of our chiefs by the officers of Government though enmeshing them in judicial manoeuvres directed against them to prepare for their expulsion from posts of exercising their duties as judges for the people. ... (cited in Machobane, 1985: 24).

This was not because the Lekhotla La Bafo did not want reform, but many thought the reforms were too radical and diminishing the relevance of their customs too fast. Jingoos is said to have spoken to the Paramount Chief and her advisers at Matsieng this way;

... I appeal to you to approach the Government. Tell them the time is not yet ripe. I do not mean that I am against what the Government is introducing - I know we need many reforms in our country but this is not

the time for us to change our ways so radically - not yet ... Let the British teach us first how to handle new ways ...⁴¹

In a similar fashion Pim (1935) indicated that the conduct of chiefs and the need for improvement was generally being admitted. However, as a result of strategies worked out by the Lekhotla La Bafo, Machobane (1985) argues that when the Draft Regulations were finally brought to the Council for discussion in October 1929:

Chiefs torpited them out. The strategy was to knock down the centre pin of the Draft Regulations, namely, the enabling Proclamation 2B of 1884. (Machobane, 1985: 24).

The argument was mainly that the Proclamation was a Cape Colony creation and not one of the British Government, and hence was null and void. According to Machobane (1985), the contrary was the case, but the Resident Commissioner did not know the facts. This point is further endorsed in Pim (1935); he contends that, the majority of the Council had come to view the proposals as an attack on the hereditary rights of the chiefs who, in the provision of Proclamation 2B of 1884, could now be appointed by the Resident Commissioner to adjudicate:

or have their powers limited in any way except by addition to the so-called Laws of Lerotholi first accepted by themselves and incorporated in the law by order of the Paramount chief.

Having deliberated on the proposals without any conclusion and agreement, the chiefs were then given leave

to consult with the Nation. When they returned five days later they claimed that they had held public assemblies throughout the country and the people were in agreement with them, and that they did not want the Regulations (Machobane, 1985). On October 19, the usual panacea (Pim, 1935) of referring the Regulations to a strong committee, was finally adopted. Then on the 23, only five days later (Pim, 1935; Machobane, 1985), the committee felt itself able to report as follows:

Your Committee, Your Honour, submits as they have been appointed as coming from all the corners of Basutoland, they called Pitsos in order to find out the feelings of the people with regard to the little book (i.e. the Draft Proclamations) which, Your Honour, we have found through letters and reports submitted to the Committee that the Basotho Nation throughout unanimously fear the enacting of the proposed Proclamations and the Nation desires that the book of the Laws of the late Paramount Chief Lerothodi should be confirmed (enforced), caused to be respected, and made use of by the Courts of Chiefs in Basutoland. For these reasons, Your Honour, Your Councillors recommend that a Proclamation should not be made but the Laws be made which will be in the book of the Laws of Lerothodi which the Nation likes.

Thus again the efforts towards reform had failed. As Pim (1935) put it, the colonial administration had tended to confirm the attitude of the Council which was set out by Moshoeshoe in 1862, by putting the proposals of such importance to the Nation; not as policy adopted by the Government, but as mere suggestions at the discretion of

the Council.

Poulter (1972) believes that it was only as a consequence of Sir Alan Pim's Report of 1935, that important administrative and Native Court Proclamations of 1938 were made. A similar view, that it was the Pim Report which finally culminated into the 1938 reforms is expressed in Palmer and Poulter (1972). Another view, however, is that the reforms of 1938 were the culmination of a historical process; consisting of factors relating to the ill-defined constitutional status of Lesotho under the British Crown, which resulted in contradictory and unsystematic policies the British adopted in ruling the Territory. In addition, the chiefs had lost touch with the commoners and there was a growing demand for political change by the commoners who had become resentful of chiefly abuses (Machobane, 1985).⁴²

The Pim Report focused on how the customary system of "placing" had been widely abused, owing to the great increase in the numbers of the so-called chiefs which necessarily also meant an increase in the numbers of the courts as well. It also made reference to the fact that the only penalties which the chiefs could inflict were fines of stock, part of which went to the court, a part which naturally had to be realised before others. This made, as it was claimed, the income of the chiefs dependent largely on the amount of crime. The report also pointed to the lack of compulsory measures for record-keeping of

cases except in the Paramount Chief's and Principal Chiefs' Courts. In addition, Pim reported on the widespread complaints of delay or denial of justice which had often been voiced in the National Council. Generally, he felt that the fundamental defect could be traced to the multiplication⁴³ of courts and the chiefs' partial dependence on fines inflicted in the courts. With mounting pressure from the people, the colonial administration decided to introduce reforms, which affected dispute settlement processes. In 1938, simultaneous Proclamations were passed, based mainly on suggestions contained in Pim's Report of 1935.

THE 1938 REFORMS⁴⁴ AND THE EVENTS THAT FOLLOWED

In his autobiography by Perry and Perry (1975), Jingo points out that the period between 1938 and 1948 was a time of turmoil in Lesotho, when the trust between the Chiefs and the Commoners was put to severe test, and when the chiefs misguidedly signed away most of their powers. It was at this time that he claims to have evidenced the indigenous system of the Basotho crumbling.

Machobane (1985) says it was in December, 1938 that Sir W.H. Clark, the British High Commissioner, promulgated two radical Proclamations affecting the Crown Colony of Lesotho; namely Proclamation No. 61, the Native Administration Proclamation and Proclamation No. 62, entitled the Native Courts Proclamation. The former,

provided that the High Commissioner could, in consultation with the King of Lesotho, declare any person to be Principal Chief, Ward Chief or Headman in the Territory. Section 3 of the same Proclamation gave the High Commissioner powers to revoke or vary appointments of chiefs. The Proclamation specifically defined the functions of the chieftainship and its powers were reduced. The chiefs were brought under the control of the Colonial administration and their numbers were cut from about 2,500 to 1,340.

The second Proclamation No. 62, the Native Courts Proclamation, provided for the "recognition, constitution, powers and jurisdiction of Native Courts and generally for the administration of justice within ..." the Territory. The Proclamation gave the Resident Commissioner power, with the approval of the High Commissioner, to issue warrants recognising or establishing such Courts as he saw it fit. Thus he exercised control over the number of courts as well as the personnel in them. Members of the courts could be suspended and even dismissed, again with the approval of the High Commissioner. According to this Proclamation, only the courts with warrants could exercise jurisdiction under the law and get engaged in dispute settlement. The 1,340 chiefs, sub-chiefs and headmen were, under the Proclamation No. 61 of 1938, to be recognised by identification in the gazette and were all issued with court warrants at the outset.

Hamnett (1975) argues that the 1938 Proclamations, laid the foundation for a revolutionary change in the structure and role of the courts, by specifying that no chief could hold a court without a warrant and limiting each court's powers and jurisdiction to what the warrant specified. He further argues that the award of warrants to all the 1,340 chiefs whose names appeared in the first gazette with the initial introduction of the 1938 Proclamations, served to disguise from most Basotho, the magnitude of the changes contemplated by the new laws. In particular, it obscured the basic principle that it was no longer the chieftainship but the administrative recognition by warrant that bestowed the authority to hold a court. Common practice, even in recent years, as discussed in the next two chapters, reveals that people have still not appreciated this.

As Jingoos (Perry and Perry, 1975) puts it, the Proclamations were an attempt by the British to stabilize the then existing political structure by recognizing only a limited number of chiefs, sub-chiefs and headmen through a gazette, in which those not gazetted were not officially recognised. According to him, the right to gazette was actually placed in the hands of the Principal Chiefs, who acted in collaboration with the District Commissioners in recommending to the Resident Commissioner as to who was to be gazetted. This, as he says, came as a blow to the petty chiefs, especially for the headmen who were commoners and happened to fall out of their Principal Chiefs' favour,

and as a result were struck from the gazette. In his view, the Proclamation led to even worse abuse, since many Principal Chiefs saw to it that only their favourites were gazetted, while many efficient and respected men went unrecognised.

Further changes were introduced later on. According to Ashton (1952) the real initial reduction in the number of courts came in 1946, when the first attempt to separate administrative and judicial functions of native authorities, namely, the chiefs, was effected as a result of the 1938 Proclamations. In that year only 121 chiefs were issued with warrants (Ashton, 1952; Hamnett, 1975; Palmer and Poulter, 1972); and in 1949, this number was further reduced to 106 (Ashton, 1952; Palmer and Poulter, 1972). The 1946 reduction was a consequence of the setting up of the National Treasury for the Territory which necessitated a careful scrutiny of the number of customary courts the country could afford. The Drafting Committee had recommended a reduction of the courts to a number totalling 117, including five Central Courts of Appeal, but had not set down a clear principle for the separation of executive and judicial functions, the presumption being that the chiefs would not ordinarily sit in their own courts but would rather appoint others to act as presidents, perhaps from among responsible sub-chiefs (Palmer and Poulter, 1972). This is how the Native Courts came to be commonly referred to as the "National Treasury

Courts" a term which Ashton (1952) employs. Hamnett (1975) also points out that of the 121 original courts awarded warrants in 1946, only 106 were remaining after another reduction a few years later - which was in 1949.⁴⁵

In an interview, Bereng⁴⁶ argued that the establishment of the National Treasury came with the realization on the part of the British that, the attempt of regularizing the system of government and judicial courts was not in itself sufficient. The courts, in effect still remained sources of revenue for the 1,340 gazetted chiefs recognised in accordance with the Proclamations No. 61 and No. 62 of 1938. The idea was that the courts should not enrich the chiefs, which was only possible if the chiefs were denied all judicial powers, and left to be only administrative authorities as provided for in Proclamation No. 61, and forbidden to appropriate fines paid into their courts for personal benefit. The aim of the Proclamations, including the establishment of the National Treasury, was to bring an end to this abuse; and to the chiefs' control over judicial matters.

A further explanation about the establishment of the National Treasury made in the autobiography of Jingoos (Perry and Perry 1975), is that this was a move by the British to grant the Basotho more control over their own affairs, a thing for which they had been clamouring. The funds that were to be deposited into this Treasury would

come partly from a new system of law courts that were to be created, which when they came into operation became commonly known to the Basotho people as the Basotho Treasury Courts. As he observes, up to that time, the only Courts which the Basotho had had apart from the British hierarchy of Magistrates' courts, were the chiefs' courts.

The numbers of these courts were cut down drastically and the people who worked in them became salaried officials and the fines no longer went to the chiefs. Bereng added that the courts were given case registers and receipt books, the latter being used when any payment, whether to "open the court" or of fines were made. The people were to be given payment receipts, and all the proceeds from the courts were to be deposited with the Treasury. The accountants in the districts had the collections made at the courts, deposited with them each month - they would check the money against the receipt books before forwarding it to the Head of the Treasury at Matsieng. This checking assisted to overcome the problem of misappropriation of funds, which as he noted, had become very rife. In addition, even stray stock, was according to the new system, to be sold and the money deposited into the Treasury and the chiefs were compensated by being paid salaries by the Government (Bereng: 28.4, 1987; Perry and Perry, 1975).

Another problem mentioned by Bereng is that when the chiefs became salaried they only functioned to impress the British administration in order to get increments. As he

explained, they came to forget that "a chief is a chief by the people"⁴⁷ and became chiefs by the white man from whom they were getting the money.

In addition, Jingoos (Perry and Perry, 1975) observes how the chiefs' loss of the rights to impose fines in their courts led to a chaotic situation for some time, for many of the headmen and chiefs persisted in the old ways and kept fines for their own benefit. They could not appreciate the fact that their courts only existed in an unofficial capacity, to try and make peace among their subjects. They had become only mediators; without powers to enforce their decisions. This, they could not grasp - they could not understand that what had always been tradition had suddenly become misappropriation of property, as a result, many headmen had to be punished in this period of confusion, some even appeared before the same Treasury Courts. He further notes that not only did the chiefs and headmen have trouble in implementing the new law; but the people suffered as well because they knew nothing about the revised court procedures.

Making reference to one case Jingoos, (Perry and Perry, 1975), illustrates the above point more clearly. He notes how one presiding headman is reported to have said:

This court has no power to fine you, Makiki. My court is only there to try to make peace. It is up to you now, Monakoli, to make up your decision. If you want peace with Makiki, you can drop the matter, but if you want to

charge him, you can take him before the Treasury Court (cited in Perry and Perry, 1975: 227).

In certain respects the new courts were more welcome to the people, because they aided in overcoming the problem of delays. For one, the system of appeal became diffused; with appeal courts more widely distributed throughout the country than before when all cases on appeal had to be heard at Matsieng. Thus previously people had to travel long distances, but even more, they had to spend days, sometimes months, awaiting their appeals to be attended to. There were instances when people got tired with the waiting and returned home, their cases unattended to.⁴⁸ Under the new system there were several appeal courts.

The National Treasury functioned from 1 April, 1946 up till 31 March, 1960, when it was closed to keep in line with the constitutional reforms that were taking place at that time. There was pressure from the people, for instance, for the need to establish a legislative council. They felt they were no more satisfied with the Basutoland National Council, but demanded for a national legislative body that would make laws for their government. On the whole the constitutional reforms referred to above were already in preparation for independence.⁴⁹

However, when the National Treasury was dissolved the courts remained, with only minor adjustments introduced. For instance, the original courts had so far been fairly or evenly distributed over the country, so that the people

would not have to travel long distances to find a court. With the closure of the Treasury, consideration was only given to leaving a reasonable number of courts in operation in order to reduce costs.⁵⁰ The issue of distances to be travelled was no more viewed as of significance in determining the number of these courts. The courts' numbers were again reduced to a total of 63. For the present numbers of the Central and Local Courts, refer to Appendix B.

SUMMARY

This may seem to have been a round-about account of explaining how the present court structures in Lesotho have come about. However, it is only through understanding and coming to terms with the historical events contained in this chapter that features of the present court system and how it operates can be adequately described. These historical events have actually led to the coexistence of court structures of different origin, and in my opinion, continue to have a bearing on the manner in which the courts are generally organised and still operate today.

First was the question of the constitutional status of Lesotho, and then the idea that the Territory would subsequently become merged into South Africa. Both enabled the indigenous structures to continue functioning with minimal disruption and interference by the colonial administration. In addition, these two factors fostered

the strong feelings among the Basotho people that what they had was only British protection, and that their internal affairs continued to be in their own hands, and that they still ruled themselves through their chiefs; who also had powers over dispute settlement processes. As a result, the feeling of Basotho chiefs and many of their people that what they had requested for was merely protection as expressed in the words of Moshoeshoe became strongly embedded.

Furthermore, an attempt has been made to describe the events of the period during which Lesotho was under Cape rule. The relations between the Cape Government and the Basotho remained tense up till the Gun War. The Basotho resisted any form of change which the Cape Government attempted. At the end of that rule, the chiefs remained dominantly in power; governing and settling disputes of all kinds among their people.

The annexation as noted earlier, was put through without prior consultation with the Basotho people, which tended to cause a lot of discontent against the Cape rule; and even further tensions were caused by policies adopted by the Cape. The feelings on both sides of the arrangement were those of hostility, as the Basotho made it impossible for the Cape administration to rule and enforce magisterial domination. The lack of committed interest in the Territory from the side of the Cape administration, added to the already complex situation, and consequently

made it possible for many aspects of customary law to continue being recognised, with much less enforcement of alien laws of the Cape. This was mainly to avoid direct confrontation with some of the major chiefs who resisted change. However, the innovations contained in the "Governor's Code" of 1871 were introduced, and this intensified the already brawling dissatisfaction, and caused the Basotho to act disobediently against the rules, that is, in addition to the fact that it was difficult for the colonial administration to enforce the rules. Due to the latter, the chiefs thus continued to act independently in the traditional manner.

When the Cape attempted to exert more control over Lesotho following change of government in 1879, replacing the chiefs' authority with that of the magistrates, bitter complaints arose. The missionaries, on the other hand, pressed for rapid changes to be made altering Lesotho customs and wanted the pace of legal change to be hastened. Efforts to change the Basotho way of life so rapidly were counteracted by the chiefs, but rivalries between Moshoeshoe's sons added a new dimension to the situation; Masupha, in particular, was totally opposed to the changes accepting no magistrate in his district. The Colonial administration thus had to exercise caution not to cause even great bitterness among the major chiefs. Only through such careful manipulation did they win the favour of the minor chiefs and a good number of the Basotho; thus

creating a rift between the chiefs and the people. The introduction of magisterial rule, caused unease at different times. For instance, it is held to have been a direct cause of the rebellion of Moorosi and his sons; as a result of the establishment of a magistracy in his area; following a further sub-division of one of the larger districts.

Things took a new turn under Sprigg, who wanted a much more vigorous path to change and curtailing of the chiefs' powers. Combined with the disarmament policy, a rebellion against the Cape's style of government resulted, and this sparked off the War of Guns (1880-1881). This brought a collapse to the magistrates' rule and ability to enforce the new legal ideas. Due to heavy expenses the Cape government incurred through the war, peace was negotiated, and discussions were opened for the British to take charge over Lesotho. The disannexation was accordingly arranged by Act 34 of 1883, though the British took full control in 1884.

The fact that the Cape had no real intention to spend more than the tax collected on the Territory is of significance. Because of this, the administration in Lesotho remained small, and perhaps contributed to the failure to set the magisterial rule from the ground. The attitude to keep expenditure on the Territory to the minimum persisted even under the British following the disannexation of Lesotho from the Cape in 1884 - the

original idea of the British having always been that Lesotho would finally be incorporated into South Africa. But it was perhaps thought this was the easiest way of administering a country so determined that all it wanted was protection and not rule. The British when they took charge, introduced no significant change to policies already set forward by the Cape, magisterial rule was revived, giving the chiefs jurisdiction over minor civil and criminal cases and their judgements were made subject to review and scrutiny of the Resident Commissioner. Thus while introducing the European law, provision was also made for the continuation of indigenous laws and institutions; which was in line with the British policy of indirect rule.

It was explained that the Basotho resented the idea of incorporation into South Africa very much, but most important, of course, is the revelation that they still valued their customs and laws highly as this is shown in the description that preceded. This tended to make them oppose British rule, calling upon the words of Moshoeshoe several times, in an attempt to reaffirm their independence.

Masupha can be quoted as a clear example of the opponents of British rule, but even later on, Josiel Lefela made a statement that clearly revealed the same opposition towards reforms introduced by the British on the one hand; while on the other, it shows how strongly attached they still felt towards the chieftainship and therefore

determined to protect the chiefs against the British's endeavour to destroy them and diminish their powers. Similar trends of hostility can be traced in the debates of the National Council as well.

Another step towards reform was that attempted in 1929, at the end of which the British administration still emerged defeated. Because of instigations from the Lekhotla La Bafo, the Council Sub-committee that had been formed to consider the Draft Proposals for Native Courts, reported that the people did not like the Proposals but preferred the Laws of Lerotholi instead. The British had always adapted a soft line towards introducing change, they often met with feelings of hostility and strong opposition from the Basotho. This attempt towards reform had again failed.

It is in this sense that it could be argued that it was only in 1938, that the first steps were taken to check abuses which had developed in the indigenous system. The numbers of chiefs and courts were reduced. Further changes were introduced in the period 1946-9, among those, two directly affected the existing mechanisms of dispute settlement and these were: the establishment of the Basutoland National Treasury and a new system of courts which as Jones (1959) described; came to deprive all chiefs of their former courts (at least in theory), and which left the appointment of the new courts personnel in the hands of the Ward Chiefs. Other changes affecting the

judicial courts, especially those relating to structure, jurisdiction, procedure and evidence are discussed fully in the following three chapters. The 1938 and 1946-9 reforms have been amended several times but still substantially remain in force as discussed further in the subsequent chapters.

The Basotho's resistance to the reforms coupled with the issue of the constitutional status of Lesotho under colonial rule; continually wrecked attempts towards reform, even at the time when abuses in the administration of justice had become an issue of public of debate. On the one hand, the British appeared to back-down, which aided to strengthen the opinion of the Basotho that the British were only there to provide protection. Thus the Basotho continued to believe that their chiefs were the ones ruling, and later that the National Council was the only one which could make laws for the Basotho. At least that is what practice seemed to convey.

Amidst all these transformations the Basotho continued to operate mainly on the basis and according to their customs and laws. Their indigenous system of dispute settlement remained intact during a greater part of British rule until 1938. The Proclamation 2B of 1884, for instance, recognised the powers of chiefs of holding judicial courts and enforcing their judgements unless one chose to appeal against his chief's decision which Burman(1985) says was an unlikely event in the

circumstances of the country after the Gun War. Only in a few specific instances were cases reserved for magisterial attention.

The changes described above mainly led to the emergence of what are in this thesis referred to as the official courts. On the other hand, the chiefs' courts in their traditional form continued to operate "unofficially" although their judgements in theory, do not carry the force of law. The next three chapters give attention to each set of these structures respectively, and to how they operate in the present day.

It could prove a futile exercise to go all over the changes introduced by the colonial administration during its period of domination in Lesotho. However, the significance of the above historical events, for purposes of this work, lies in the extent to which they permitted the mechanisms of dispute settlement emanating from different cultures to coexist. Quite clearly, by the end of the Colonial period, a plural system of courts, other than a dual system as often depicted in the literature, had been set up. The operation of more than a dual system of courts cannot any longer be ^{down}played, especially in the light of the experiences of the latter years as described in the next chapters.

CHAPTER 3

THE "UNOFFICIAL"¹ COURTS : THE INDIGENOUS FRAMEWORK FOR DISPUTE SETTLEMENT AMONG BASOTHO

The descriptions in this Chapter focus on the indigenous machinery for dispute settlement in Lesotho. This is the system which has existed from times immemorial, and continued to function unaltered for a large part of the period of colonial domination. Despite the reforms introduced by the colonial powers, the Cape Colony and the British Administrations, during this period, the Chiefs have continued to play a major role in disputes involving the Basotho at village level, and it can be argued that up till the 1938 and 1946 reforms, these were the only forums for dispute settlement generally known to and accepted by the Basotho people. Today these courts coexist with the set of judicial institutions introduced by the colonial powers in the manner described in chapter two.

Several issues are important to note. First, it should be pointed out that while some of the characteristics of these courts are described as the features of the past, many of them obtain in the present day. These chiefs' courts, for reasons to be advanced later, have in this work been termed the "unofficial" courts. The only noticeable aspects of these courts which have changed as a result of transformations in the overall legal structures, pertain to

their jurisdiction. For example, they no longer handle all cases but are restricted to minor disputes. Other changes have their roots in the process of development in which education and full-time employment, are important aspects. The impact of these on the judicial organisation of the Basotho is discussed fully in the chapter.

The historical analysis of the legal and judicial reforms as discussed previously, offers a framework within which the existence and the present legal status of these courts can be fully understood. It may, therefore, prove useful to recapitulate on the main reasons offered in this thesis, in explaining why the chiefs' courts have continued to exist, despite efforts to remove and strip the chiefs of their judicial powers, particularly during the colonial period.

In the preceding chapter it was shown how efforts to establish magisterial rule, as suggested by Rolland in his memorandum to Wodehouse in 1868, fell into disuse. The system of magisterial control was mainly aimed at diminishing the chiefs' powers and at undermining indigenous laws and the chiefs' courts - making it impossible for them to enforce their judgements; and providing suitors with channels for bringing their cases to the magistrates courts on appeal against the chiefs' decisions. However, the hostility of the Basotho towards the annexation to the Cape Colony made it impossible for the Cape administration to enforce magisterial domination at great length. Coupled

with attitudes of resentment and the impunity with which the Basotho disobeyed the new regulations set in opposition to the indigenous chiefs' courts, the chiefs continued to act independent of the colonial administration - their courts still in full operation - commanding the support of the majority of their people.

A further stage which left the chiefs' courts in a strong position came with the recommendations of the special commission on the laws and customs of the Basotho, set up by Griffith in 1872. The most radical change brought about by the regulations subsequently drafted is the one which made provision for the Cape law to apply to the white section of the population resident in Lesotho. An exception was made, however, as pointed out in the historical chapter; for cases where all parties "are what are commonly called Natives, in which case it may be dealt with according to native law".² In this sense, as Burman (1985) argues, the new regulations had in fact removed the magistrates from the average Mosotho's life, unless he chose to appeal from his chief's decision - which was unlikely in the circumstances of the country following the Gun War. This means in practical terms the chiefs continued to hear the majority of cases, except in a few specific instances where cases were outrightly reserved for magisterial attention. This would be in matters pertaining mainly to English and Roman-Dutch law principles. This state of affairs obtained for most of the colonial period,

until 1938 when the "administrative" and the "judicial" powers of the chiefs were separated through legislation. The questions addressed in this chapter give a picture of what happened to the old chiefs' courts with the introduction of the 1938 Reforms; and what position these courts occupy in the present day.

In general, the chapter deals with the nature of dispute settlement in the "unofficial" chiefs' courts; their composition; the ways in which the Basotho people regard them; especially in as far as their social significance and appreciation of their rules of procedure and evidence are concerned. Since the research studied both the official and the "unofficial" methods of dispute settlement, the results of the analysis indicate that official courtroom hearings are quite different in their procedures and tone from the "unofficial" proceedings. The argument made is that the differences referred to above, have contributed to the persisting operation of the chiefs' courts up till the present day; thus forming a third element in the overall structure of the courts now prevailing in Lesotho; I return to this point later on noting how Ashton (1952); Hamnett (1975), and Palmer and Poulter (1972) have failed to recognise them as part of the overall judicial structure.

In addition to the information obtained from existing literature, I use the data obtained from interviews conducted during the field research and also descriptions

provided by some Chiefs³ how the process of dispute settlement is carried out in the "unofficial" chiefs' courts. It is against such background that it will be possible to demonstrate that there have been minimal adaptation in the procedures and rules of evidence that were traditionally used, to those that now prevail in the received law courts.

Furthermore, it should be noted that the existence of other institutions concerned with dispute settlement such as "family councils" is recognised. Ashton (1952) for instance, reports on some of the institutions like "family councils" handling all cases affecting family relations; "Mophato" (initiation school) courts, dealing with offences such as theft and adultery cases, which are contrary to the ethical code taught to initiates, committed during the existence of the "Mophato"; and "women's courts", discussing issues affecting women where misconduct occurred or where sexual taboos were broken. Explaining this, Perry and Perry (1975) in the autobiography of Jingoos point out that in the past, women did not accuse each other at the men's "Lekhotla" (court) when they had a dispute, but had a hearing before the headman's or chief's wife in a special court. However, Ashton (1952) further points out that most of these courts' decisions could not be enforced as such, and the only sanction towards conformity was moral and social pressure as well as the offender's own good sense.

In practice this means, therefore, that before any case could come to the headman's or chief's court; attempt would have been made for a start, to settle it in these other institutions. An example from Hamnett (1975) can be used to illustrate this point more clearly, that when the judicial courts (that is, of the headmen or chiefs) handled disputes over inheritance, it was precisely because the "family council" had not succeeded in establishing rights over the "lefa" or inheritance. While the significance of the role played by these institutions in dispute settlement is fully recognised, especially because they function to complement the work of the "unofficial" chiefs' courts, the concern of this chapter is, however, with the latter. Today the "family councils" are the ones which are still predominantly utilized,⁴ as practices such as initiation ("lebollo") have fallen into disuse in other villages, with christianity and education gaining a stronghold.

The problems experienced regarding permission into the "unofficial" courts to carry out observations of their proceedings were expounded upon in the methodology chapter. The wealth of the information yielded by and the knowledge gained from the interviews and the descriptions provided by the chiefs⁵ about these courts cannot be doubted. They provide adequate insights into the place of the "unofficial" chiefs' courts within the overall judicial structure, how these courts operate and also about their social significance especially in relation to the official

courts and also in dispute settlement in general.

THE EXISTENCE OF THE "UNOFFICIAL" COURT STRUCTURES AND THE ROLE OF CHIEFS IN DISPUTE SETTLEMENT

The foundations of the present status of the "unofficial" chiefs' courts as hinted before, lie primarily in the introduction of the 1938 Proclamations. But the actual and most crucial changes of their position came in 1946 when the provisions of the 1938 Proclamation were ^{given} effect. With the establishment of the Basutoland National Treasury, the first real attempt to implement the provisions separating the "administrative" and "judicial" powers of the chiefs was made. This led to the reduction in the numbers of courts leaving the ones that were cut-off constituting the present "unofficial" chiefs' courts. The following sections address this point in much greater detail.

As Hamnett (1975) argues, the 1938 Proclamations brought a revolutionary change in the structure and the role of the courts, by specifying that no chief can hold a court and carry out judicial functions without a warrant to do so. The Resident Magistrate Mohale, in an interview with him, pointed out that the 1938 Proclamations were intended to bring the traditional idea that everything starts from the chief's place "moreneng" to an end. In his explanation, they were meant to establish a new practice instituting the separation of powers with

guaranteed "checks and balances". To put it in his own words, the Proclamations provided:

that administrators should administrate, and that checks and balances should be there, that there should be adjudicators who will not adjudicate, administrate and at the same time prosecute (Mohale, 30.7.1987).

Under the terms of the Proclamations, the courts of the chiefs not granted warrants bestowing them with judicial powers were to function only as "administrative" courts. Thus the system which had existed up till then, in which the exercise of both judicial and political authority were complementary functions was to cease. Until then, the judicial, political administrative and many other important functions had by tradition been fused together and invested in the chiefs. The Sesotho law, as Ashton (1952) shows, bound every chief to preside over cases of any disputants, unless by reason of his illness or otherwise, the disputants were satisfied of his failure to do so. As Palmer and Poulter (1972) point out, this principle even came to be stated in the Laws of Lerotholi; the first version of which was published in 1903.

Thus ordinarily, by tradition, each chief used to have a court.⁶ As confirmed in the autobiography of Jingoos by Perry and Perry (1975), each of the chiefs' courts performed both "administrative" and "judicial" duties without any distinction. In practice this is still very much so even in the present day, because wherever there is

an "administrative" court established in terms of Proclamation 61 of 1938 (Native Administration Proclamation), that court also sits to consider matters which, in the strictest interpretation of the law, should be handled by the judicial courts officially afforded such status through award of warrants. It is on the basis of this observation that Resident Magistrate Mohale when I interviewed him, admitted that there is still that "hangup" from the past, and as he continued:

Some [people] up till now, do not know the line of demarcation between the "administrative" and "judicial" powers. They do not know about these "things" of separation of powers and checks and balances. They do not appreciate how the separation of powers between the "administrative" and "judicial" should be put into practice (Mohale, 30.7.1987).

Hamnett (1975) does not only mention that every chief had his own court, but also affirms the point that traditionally, there was no distinction between what are now called "administrative" and "judicial" affairs, and the chiefs had to discharge a plurality of tasks which were not segregated into distinct "roles" or "capacities". The multiplicity of the functions performed by the chiefs included acting as judges in disputes among their subjects; adjudicating rival claims to land; maintaining order in their wards; and punishing those who broke the peace and disturbed the order, and administering the fines paid to them in their courts and so on. It is for these reasons

that the chief's "khotla" court is still understood in the indigenous sense as the central place in the village, where administrative, political, ceremonial events and dispute settlement are carried out. This view about the chief's "khotla" has never really changed from the point of view of the Basotho people, it is still regarded as a place in which the chief carries out his multiplicity of duties whether "administrative", "judicial" or otherwise. This is the "hang-up" which Resident Magistrate Mohale, as noted earlier on was referring to, in which many people still believe that everything should be initiated from "moreneng" the chief's court.

It is worth noting at this juncture that the authority vested in the chiefs as illustrated in the foregoing discussion, and also the possibility for recourse to them on the variety of issues and difficulties is built into Sesotho tradition and customary way of life, in which chieftaincy as a long-established institution of power; is well suited for interpersonal relationships and interests. For this reason the subjects continue to bring matters of all kinds to their chiefs. As indicated in the words of one party⁷ in a case involving dispute over land:

Chief X would have understood my case better. After all he allocated me the piece of land himself. He would know the boundaries of the land better.

This example is taken from the proceedings before a Local Court in which a party was failing to give sufficient

(clear) evidence concerning the boundaries of the land in dispute. In his view, the chiefs' court would have been the most suitable place for handling the matter, as the Chief would already possess knowledge of other factors pertaining to the land in question, including its allocation.

For many Basotho people, the purpose of bringing a dispute to the chief's court and the decision to do so, is not so much based on whether the matter is "judicial" or "administrative", nor does it lie in the fact that a penalty will be imposed, but rather it lies in the trust of the Chief's court's efficacy to restore disrupted good relations between the parties in dispute - making no distinction of whether the matter in issue is "administrative" or "judicial". This is a fundamental pursuit of the role of the chieftainship as seen and expressed by many Basotho, and for as long as their concern remains as such, and their attachment to the chiefs is maintained so strong, the "unofficial" courts continue to have an important part to play in judicial matters as it is in fact today regardless of the fact that the law says these courts are legally not recognised.

The "unofficial" courts are an equivalent, at least in function, of what Comaroff and Roberts (1981) describe as the body of "all advisers and headmen" among the Tswana, which periodically⁸ meets to consider affairs of policy and administration, but which also has as part of its functions

the settlement of disputes. The "unofficial" courts in Lesotho are, however, not legally recognised as part of the overt official machinery of dispute settlement; at least theoretically. The practical reality, on the other hand, reveals a different picture as shall be discussed later on - their functions are not only restricted to "administrative" matters as the law prescribes.

The truth of the matter is that when the 1938 Proclamations were implemented, the chiefs' courts never ceased to exist, they were never eradicated. Even subsequent reforms, including those passed after independence, have left the chieftainship still performing multiple functions in their courts. Ashton (1952) for instance, states that following the introduction of the 1938 Proclamations, the remainder of the courts, that is, those that were not awarded warrants bestowing them with judicial powers; continued to function although as "courts of arbitration" only. He further points out that the chiefs continued to preside over these courts, though their decisions could not be held as final or binding and could not be enforced by the infliction of fines or any other sanction. A similar point is made in Palmer and Poulter (1972) that when reductions were made in the numbers of courts, the other courts of the original 1,340⁹ continued to operate as "courts of arbitrament". Again the point that their decisions could not be enforced is made.

The real traumatic cuts in the numbers of the courts

came in 1946, because in 1938 as pointed above, all the 1,340 chiefs, sub-chiefs and headmen who were recognized by identification in the gazette were also granted court warrants giving them powers to perform "judicial" functions as well; that is, in addition to their "administrative" duties. This as Hamnett (1975) notes served to disguise from the Basotho, the magnitude of the reforms that were to follow later on. Carrying the argument further, Hamnett (1975) argues that the 1938 Proclamations (their implementation) not only left the old chiefs' courts essentially intact, though limiting them to the "administrative" functions, but also expressly permitted the existence of "Arbitration Courts" which he describes as "informal tribunals" without statutory powers, whose function is to settle minor disputes if parties involved are willing. He further says that these courts constitute a third element in the structure that was expected to evolve. It is in this light that these courts are in this thesis termed "unofficial".

If one accepts the foregoing arguments then the court system of Lesotho cannot be argued to be dual by nature, but it is rather a plural system consisting of the chiefs' courts, the officially recognised customary courts, and finally, the received law courts. Later on, the question that the "unofficial" chiefs' courts are still operating as part of the overall judicial system is further addressed. For this reason as I shall argue, their inclusion in

forming a complete picture of the mechanisms of dispute settlement now existent and operating in the country is essential. Further it is argued that the existing literature only acknowledges the existence of these courts, but falls short of seeing them and recognising them as operating as part of the overall judicial structure. The following descriptions demonstrate that the official court structure in practice functions hand in hand with the "unofficial" chiefs' courts, in particular at the level of the customary courts.

From the discussions held with various informants whose descriptions of the chiefs' courts are contained in the analysis below, it became obvious that the existence of the chiefs' courts is not worth debating any longer. The fact that they are there and that they are still operating is well accepted in the literature as cited above, and it is also a factor appreciated even in the official echelons of the judicial system as shall be further demonstrated. The debate should, therefore, now move towards explaining and creating a better understanding of the form in which these courts presently exist, their role within the overall judicial system, as well as their character or nature of their proceedings in terms of the procedures and rules of evidence they employ. This will, in turn, aid us to have a better appreciation of the reasons underlying their continuing existence and why they have persisted to function, despite the fact that Proclamation No.62 of 1938

rendered them illegal and thus possessing no judicial powers.

What I established during the field research is that, the existence of the "unofficial" courts is surprisingly not disputed even by the legal professionals themselves. As evidenced from the informants' statements below, legal professionals are not only aware of these so-called "non-statutory judicial" mechanisms of dispute settlement, but some even regard them as crucial and a necessary part of the judicial process, for example, the latter point was made by the Chief Magistrate.¹⁰ On the other hand, the Attorney General confirmed that "Makhotl'a Marena" the chiefs' courts still prevail, though they have no judicial powers which he explained as meaning that their decisions cannot be enforced by the state or law. This point is similar to the one raised by Ashton (1952); Hamnett (1975); and Palmer and Poulter (1972); as discussed earlier on. Furthermore, the Attorney General explained that the chiefs still deal with judicial matters despite the fact that they have no powers to do so, and despite the fact that their decisions have no force of law. In fact he pointed out that "many disputes 'likhang' are settled by the chiefs", implying that they never reach the official courts.

In response to the question concerning the existence of these "unofficial" courts, the Acting Chief Justice, in an interview with him, remarked as follows:

You mean these courts in the villages
"a fariki e jele mokopu, kapa joang?"
 (when translated this would mean "when
 a pig has eaten [destroyed] pumpkins,
 or what?) These courts certainly
 exist. (Kheola: 16.2. 1987).

Similarly the Acting Chief Justice admitted that the chiefs still settle minor cases in an attempt to reconcile the people, but as he pointed out "if they fail they pass the case on to the Local Courts".

The role of the chiefs in the "unofficial" courts remains quite a crucial one. For instance, Hamnett (1975) indicates that the function of "informal" arbitration is largely discharged by the chiefs' courts, with the result that the supposedly "administrative" courts took over the quasi-judicial function of arbitration. Thus at the lowest level of the structure, the "judicial" and the "administrative" roles of the chiefs are still largely fused, and the chieftainship and the "courts of arbitration" are continuing to play an important role in dispute settlement and in judicial affairs in general. For example, as stated by the Director of Public Prosecutions "the chiefs are the ones who report to the police any offence that occurs within the villages", he said this is a "customary practice and an established procedure".¹¹ This was reiterated by Resident Magistrate Mohale, who indicated that the chiefs are still generally in charge of law and order in their respective villages. For him that gives the people the right to choose to take their disputes

for hearing before the chiefs' courts if they so wish. As he expressed it:

the chief is a policeman, he polices his own society, he is a peace officer and therefore has powers of arrest. Let me say in criminal cases, a person is assaulted or a rape occurs, one does not immediately rise to the police in authority, but first reports the matter to the chief (Mohale, 30.7. 1987).

This is an indication of how in practice the chiefs functions are still widely varied.

THE HIERARCHY OF THE "UNOFFICIAL" COURTS

The lowest level of the "unofficial" courts functions at village level where the headman or chief or a deputy sits as a chief's court together with his council of advisers, to resolve every kind of issue brought to him by his subjects, including civil and criminal matters. In recent years it must be admittedly pointed out that most of the cases they handle are civil, although minor criminal offences such as "assaults" or "fighting"¹² are still settled there. This is mainly because the more seriously regarded assault cases are now more likely to involve police investigation and hence are referred to the official¹³ courts. Hamnett (1975) says from one point of view, the chief's court can be seen as a clearing house for a wide variety of matters, those which it cannot settle; because in the indigenous expression are "too hard" ("li thata") for it; are the ones remitted to whatever authority

or court that seems appropriate.

The hierarchy of the chiefs' courts in each locality varies in accordance with the territorial ranks or geographical jurisdiction of the chiefs. The "unofficial" courts cannot be properly understood unless they are seen in this context and also in that of neighbourhood and communal relationships of village life in Lesotho. As the Acting Chief Justice stated, these courts are best suited for the rural setting, first because of their close proximity to the people, and secondly, for the simple fact they are "personal and informal - no strict rules of evidence exist, you simply listen to what the people have to say, so that even hearsay evidence is acceptable".¹⁴ As he further explained these courts are in that sense advantageous for the mostly uneducated sections of the population who do not understand the procedures in the official courts of justice. The main function of the judicial process in the rural setting is to sustain the relationships that exist among the people and to restore them when they are breached. This is achieved by allowing the people to air their differences in an open manner as far as possible. The proceedings are conducted before a local chief or headman who is the authority in the village, and has a duty to play this role in the eyes of the community.

The role of chiefs or headmen in judicial matters differs from one place to another. As the Attorney General

pointed out in an interview, some chiefs perform their job meticulously and manage to settle many disputes that come before them with success. Thus in such cases the chiefs win the will and command the respect of their people. The Resident Magistrate Mohale also admitted that there are some well known chiefs who carry out their duties very well, who have made decisions upheld to be correct, but some of the chiefs as he pointed out are "useless".

A similar point is made by Hamnett (1975) who shows that there is a considerable variation in the assiduity and conscientiousness displayed by minor chiefs and headmen in running the lowest level of arbitration courts. Some work hard and responsibly and command the willing power and obedience of their subjects; others are lazy, senile, venal or partisan and if they lack power to enforce their will, matters that come before them are likely to proceed to a further court before settlement. This, however, Hamnett (1978) argues, is unlikely to be the official judicial courts, because as described earlier, the arbitration court of the lowest rank is in fact that of another chief of a lower status in terms of rank or geographical jurisdiction. Matters not settled there are usually referred to the court of the chief immediately superior in rank, and from him it may well proceed to yet another stage in the supposedly "administrative" hierarchy. Only then, very often, will the matter be sent to the lowest level of the customary law courts in the official

court structure, that is, the Local Courts. The Local Courts according to Hamnett (1975) are indeed often considered in local parlance as "courts of appeal"; the "unofficial" chiefs' courts being considered as the courts of first instance.

In the view of Hamnett (1975) the litigious passion of the Basotho is such that, what I have called official judicial structure in this thesis, could hardly function were it not underpinned by this "officially invisible" hierarchy of chiefly tribunals. This was affirmed even further during my discussions with some of the informants. For example, the Director of Public Prosecutions said that:

Even before coming to the Police, the complainant in a dispute must go to report the matter to his chief. It is a customary practice that any offence that occurs within a village must first be reported to the chief and then he can call in the police.¹⁵ (Peete, 30.1.1987).

The above statement shows that the role of chiefs goes beyond just presiding over the dispute settlement proceedings. They are also responsible for reporting cases to the police,¹⁶ presumably where they cannot settle the matters themselves. A similar point was raised in the interview with Judge Molai; in which he explained that "when people wrong each other in the villages, the matter is reported to the chief, who then takes a preliminary hearing and then refers the case to a court of law; where the parties do not agree to the settlement given by the

chief".¹⁷

From further statements obtained during the interviews it was illustrated that the "unofficial" courts are, in fact, regarded as a normal part of the judicial process. For instance, the Chief Magistrate, expressed that "they are a necessary process because what they really try to do is to reach an amicable settlement without having to go to [into the] task of having to pay court fees". It is along similar observations that Hamnett (1975) argues that even the Judicial Commissioners' Court, which before the abolition of the Appeal Court at Matsieng was the third recognised level of appeal handling up to 500 or 600 cases a year; could more realistically be seen as constituting the fifth or sixth stage in the total process of dispute settlement, since there may be two or more "unofficial" stages to go through; before the lowest rung of what he refers to as the "formal" judicial hierarchy is even reached. Thus when the cases reach the so-called "treasury courts" ("treshareng or teraishareng") in the local parlance; which are officially now known as the Local Courts, they are considered to have reached a stage of appeal, having gone through the chiefs' courts first, which does confirm the point noted above by Hamnett (1975).

The Director of Public Prosecutions' statement below further indicates that the chiefs' courts are regarded to form part of the whole machinery of dispute settlement, in practice. As he indicated:

Even the "informal" structure has got to be formalised to some extent. There must be an accepted way of doing things - you cannot do things in a haphazard way. There must be somebody to report to, and a defined way as to how the report has to be made (Peete: 30.1.1987).

According to him the acceptable practice in this case is that, all matters are reported through the chief's court, and as he further continued "it would be very primitive to say our own practice of doing things is "informal" within our own society. The traditional structure still exists".

A further point made by Hamnett (1975) is that, while in theory every Mosotho has a right to initiate a civil action before the customary Law Courts (Local and Central Courts), very few people actually believe this. On the contrary, the practice tends to be that, one cannot "open the Court"¹⁸ without the authority and interposition of the chief. This seems to be implied in the explanations given by the Director of Public Prosecutions and Judge Molai, referred to earlier on. It was found out during the field research that the people would often speak of taking or having taken their cases to "khotla" (short form of Lekhotla) which means court, or to "Moreneng" ("morena" meaning chief) that is, the chief's place or court. They made this distinction from when they have put their cases before the "treshareng" or "teraishareng" ("treasury courts") which today consist of mainly Local Courts as courts of first instance. This distinction is important

for them because they consider the Local Courts as appeal courts and the chiefs' courts as courts of initial jurisdiction.

"BANNA BA LEKHOTLA" (MEN OF THE COURT): THE CHIEF AND HIS ASSISTANTS

In discharging his multiplicity of functions each chief is assisted by men from the village. This point is also made by Ashton (1952) who indicates that traditionally, every authority was assisted by relations and friends who were senior members of the ward, and regarded as having a right to help the Chief. He says that the chiefs had "informal" panels or assistants called "Banna Ba Lekhotla" men of the court; one of whom unless otherwise arranged, acted as the president in the chief's absence. According to Palmer and Poulter (1972) these panels of assistants were usually drawn from the chiefs' relations and it was from among them that a court president would be chosen, with other assistants stepping in where the president was not able to hear a case himself. One of the informants simply noted that the chief is assisted by "banna ba motse" men of the village, in carrying out his duties.

Ashton (1952) further points out that the organisation of this panel was loose and variable, in terms of numbers and attendance at hearings. However, he indicates that each member had to excuse himself if he could not attend

for a long period. He points out that in other cases the assistants helped continuously for short periods after which others could take their place. Some chiefs had permanent deputies or close advisers who could, in turn, call for the assistance of other people as need arose. According to Damane (informant), the latter was common in Thaba-Bosui (former royal village) where the King, starting with Moshoeshoe I, had a standing group of men dealing with appeals from the lower chiefs' courts, in addition to assisting in hearing disputes in the area's court of first instance. Ashton (1952) shows that no strict rules existed as to who could become assistants. Usually, they were people who by birth or wealth were influential in the community. Some were blood relations of the chiefs without important holdings of their own, others were tribal leaders of their groups and usually relatives by marriage, while others were just favourites through personal qualities which appealed to the chief(s). As he indicates, those who presided over the courts were, however, almost always related to the chief either by blood or marriage, though occasionally they were outsiders of exceptional authority. Normally all these people lived under the chief, but distinguished visitors could be asked to help in one or two cases as a mark of esteem.

It was common procedure that the various persons who heard cases had to pass on information and communicate decisions to one another. But as Palmer and Poulter

(1972) report, this communication was frequently lacking hence innumerable delays were caused, both in securing the attendance of witnesses and parties and in enforcing the judgements. This is supported by Ashton (1952) who states that the president and his assistants had to keep each other constantly informed of all that went on and of what they had done, to preserve continuity and consistency of action and also because they were supposed to be responsible for one another's acts. However, he says that they often failed to do so and even where they did, they would tend to ignore a ticklish matter previously raised; by disclaiming all knowledge of it or by referring the complainant to other colleagues who had dealt with it originally. Consequently this evasion of duty led to administrative delays and to grumbling dissatisfaction among the people. This is one of the main reasons why the indigenous system of dispute settlement came under attack during the colonial period.

Another marked feature of the system was that no one received payments for their services. To some extent, as Ashton (1952) shows, these symbolised the privileges and duties of authority of those who occupied positions in the community. It was an honour and a pleasure to take part in court affairs, but it was not entirely without material rewards. For example, the chiefs kept the courts supplied with meat and other food, and sometimes animals paid as fines were killed to be eaten by men of the court; while

occasionally chiefs would hand-over a few beasts to the court president and others.¹⁹ Unclaimed stray stock would often be used for this purpose. Being close to the chief also gave one a good chance of obtaining such favours as allocation of good land, or placement over a ward or caretaking of one's own after a few years of good service. However, as Ashton (1952) indicates, with the growing volume of work, the duties became onerous and the officials began to claim more definite rewards. The panel system helped to spread the work and reduce the importunity of these demands. But where the work made this impossible, the chiefs had to give in to paying salaries and to giving honoraria, sometimes out of their own personal incomes. Again stray stock became useful for the purpose. The appropriation of fines and stray stock by the chiefs' courts as discussed in the historical chapter was another source of the criticisms levelled against the indigenous system.

At present the gazetted chiefs are salaried, though not for playing a role in judicial matters, but because of their role in the "administrative" courts. This is not an issue for them since the separation of their powers into "administrative" and "judicial" categories has never taken root in reality, and in practice they have continued to deal with both²⁰ without distinction. The issue that in taking up the quasi-judicial functions, they are doing the job for which they are not paid for never arises. Those

who assist them, on the other hand, do so out of loyalty and allegiance to the chieftaincy, though they quite often receive certain favours such as those concerning the allocation of land. Again this is an illustration that playing a role in the undertakings of the chiefs' courts is still not assessed in terms of the financial rewards it may bring, but is taken to indicate a sense of duty towards one's chief.

As gathered from the interviews conducted during the field research, it is becoming increasingly difficult in recent years, to find men; especially from the younger generations, who can engage constantly in dispute settlement. The main reason for this is that many of them are now in full-time employment elsewhere, coming to the village for short periods only, thus leaving the elderly and a few unemployed ones assisting the chiefs in running the affairs of the village. However, as the Chief Magistrate mentioned, one of the most highly regarded aspects of the proceedings of the "unofficial" courts is still that it is not the chief sitting alone, but that he is with the elders of the village and "the people have a sense of belonging and respect for such people whose primary aim is to keep peace whenever the villagers come into dispute"²¹ with one another.

From the interviews with some of the informants, for example, Damane, it also emerged that with the exception of the chief or his representative and men serving on the

panel of assistants, the proceedings of the "unofficial" courts are still commonly attended by ad hoc members of the neighbourhood who take part in adjudicating upon the matter in issue. Often these would be constituted of the people knowledgeable to the aggrieved person who has cause for dispute against another, the latter would also bring his party of people usually consisting of relatives and friends. The rest of the people in attendance would be those members of the community available or interested in the matter for one reason or another. Any member of the community may drop in as there is no need for a special invitation - the common practice is for the villagers to attend. In Damane's words, even a "passer-by" ("mofeta-ka-tsela") usually from the neighbouring villages cannot be denied permission to attend and partake in the proceedings.²²

The attendance at the hearings before the "unofficial" courts resembles that of the Kpelle Moot which Gibbs (1963) describes as an "informal" airing of a dispute which takes place before an assembled group consisting of kinsmen of the litigants, and neighbours from the quarter where the case is being heard. It further bears resemblance to the membership of the "informal" judicial activity among the Bunyoro of Uganda as described by Beattie (1957); who notes that the group of people who attend such activity is ad hoc, varying in composition from case to case. The descriptions about attendance at the proceedings of

mechanisms for dispute settlement such as those being discussed here can only be appreciated by recognising their importance in relation to the nature of the procedures they adopt, which are mainly intended to remove a social grievance through elimination of a dispute (cf Allott, 1965). The attendance of the people from the neighbourhood and their participation in the proceedings are paramount because as pointed by Beattie (1957) in his work on the judicial activity in Bunyoro, the main intention of the dispute settlement process is to:

reintegrate the delinquent into the community and, if possible, to achieve reconciliation without causing bitterness and resentment, in the words of an informant, the institution exists "to finish off people's quarrels and to abolish bad feeling". (Beattie, 1957: 195).

The above statement is similar to that expressed by the Attorney General, who described the proceedings of the chiefs' courts as intended "to keep peace without causing a lot of bitterness, as is often the case in the so-called judicial courts".²³ The same interpretation can be inferred from the statement of the Acting Chief Justice; that the chiefs' courts "are more personal ..." (p.158); and advantageous for those who do not understand the procedures of the official courts; because in these courts they are given more hearing, as they are allowed to state their cases as openly as possible; and in their own words. The suggestion here is that many cases, including most areas of

petty criminal offences, are never reported to the police but are dealt with between parties in a traditional fashion, and before traditional leaders recognised in the village setting.

JURISDICTION

A point was made earlier that in the pre-colonial times the chiefs were adjudicating over disputes of virtually every conceivable nature among the Basotho, and were exercising their executive powers concurrently. Various authors, for example, Palmer and Poulter (1972) do discuss this point at length. Hamnett (1975) reaffirms this point by indicating that the chiefs, sitting in court with their councils of advisors always attempted to resolve every kind of issue, whether civil or criminal, administrative or judicial. Even today there is still no clear-cut distinction made between the matters which the chiefs' courts can or cannot handle, or between what they can or cannot do. The foregoing descriptions of this chapter serve to indicate that the main factor is that their duties; "administrative" and "judicial", have in practice remained fused despite the reforms in the law; and the distinctions between civil and criminal cases is not as technical or precise as in the received law²⁴ just as before.

As discussed by some of the informants interviewed for example, the Attorney General; the Acting Chief Justice;

the Chief Magistrate, and others, the "unofficial" courts do still handle a variety of matters including those that could be termed "judicial". It could, for instance, be cases arising between relatives such as disputes between husband and wife; or father and son. Other cases involve unrelated persons and may, for example, pertain to quarrels, abuses and assaults, adultery, theft of produce from the fields, false accusations of other persons and so on. At present though, the chiefs tend to be much more restricted in terms of what cases they can handle. These restrictions arise from the fact that it is now stipulated by law that their courts are only "administrative". Therefore, some cases especially the more serious ones are referred directly to the "official" courts. As Resident Magistrate Mohale mentioned, there is a section which bars the chiefs from adjudicating over matters of any kind. Section 21 of Proclamation 62 of 1938 prohibits any other person other than a judicial officer to adjudicate, and makes such act an offence punishable with a fine not exceeding two hundred Maluti or in default of payment, imprisonment with or without hard labour for a period not exceeding twelve months, or to such imprisonment without the option of a fine, or to both. This is at the theoretical level, because as shown earlier, the practical reality is that the chiefs continue to deal with "judicial" matters, in addition to their "administrative" functions; as the following descriptions will also further confirm.

As implied above matters which are regarded as of some gravity and which often involve police investigation tend to be referred to the official courts. Matters such as criminal offences involving murder, culpable homicide, burglary and others are, therefore never heard in the "unofficial" courts. It is the civil matters which tend to form the bulk of the chief's work. However, despite indications that the chiefs cannot deal with criminal matters as pointed out by the Judicial Commissioners in an interview with them, and that assault cases cannot be settled by the "unofficial" courts as stated by the Acting Chief Justice, there is enough evidence showing that in actual practice, the chiefs' courts do get involved with some such matters which in the strict interpretation of the law could be regarded as criminal as demonstrated below.

This is so to some extent, because it appears that the law and the people appear to adopt somewhat different conceptions and definitions of what constitutes a criminal offence and what does not. An example given by Damane when I interviewed him serves to bring out this problem much more clearly. He pointed out that cases involving fighting "li nyeoe tsa ho loana" between persons, are not all interpreted by the people in the strict sense as "assault" in the context of the received law. Hence a lot of them are referred to the chiefs' courts; and many are settled there and never reach the official courts of law since

often they are minor by nature and are seldom reported to the police. Much depends on the sort of injuries suffered - where they are considered to be minor, the matter is dealt with in the village, without involving the police and the courts of law in the official structure.

Palmer and Poulter (1972) point out that during the traditional times the courts' powers were basically limited to fines,²⁵ public ridicule and occasional banishment. Fines used to be paid to the injured party or aggrieved person; while another part was kept by the court. In an interview with Damane, he provided a further explanation that there were certain cases whose fines "likahlolo" went to the chief directly; which in Sesotho was known as "ho lefela morena". These included those fines obtained from cases such as those involving improper use of planted trees or thatching grass "liremo" and not abiding by the regulations on reserved grazing land "maboella". As he explained such cases were regarded as involving damage to national property and hence their fines went directly to the chief "moreneng" and were used to feed the people while at the chief's court for various business including attendance at judicial proceedings. Furthermore, he explained that other cases were considered as disturbing the peace, such as "fighting" in which event part of the fine would be given to the chief for "disturbing his peace", and the other part to the injured party as compensation.²⁶ The same would happen in the case of theft.

These principles are still regarded as of importance especially the compensatory element of the fine, some changes have occurred as discussed below.

Not denying the importance of the penalties referred to above by Palmer and Poulter (1972), for instance the deterrent effect they could produce, the primary aim of the chiefs' courts seemed to have been and still is less that of punishing a wrongdoer. Rather the main object is to try and reintegrate him or her into the community and so far as possible to achieve reconciliation between the parties concerned. It is for these reasons that the proceedings of the chiefs' courts always carried a compensatory element, which as Maema (1985) shows was always incidental to any proceedings, whether the matter before the court was civil or criminal. Giving part of the fine as compensation in Sesotho custom is taken to signify admission and repentance for the harm done or the injury caused. Where an injury has been caused to a person such as in assault case, part of the fine would be given to the injured party as if to pay for damages or the costs incurred as a result of such injury, a practice known in Sesotho as "ho rothetsa legeba" which Damane talked of in an interview with him. In a case of theft part of the "fine" would be given to compensate the stolen property. It is taken to indicate willingness to restore the good relations.

In the sense described above, compensation can be taken to perform similar functions to those of the exchange

of gifts in the Kpelle Moot proceedings; which Gibbs (1963) describes as signifying that the person who is held to be mainly at fault is apologetic, and that the winning party accepting the gifts of apology is accepting and showing his "white heart" and good will. It is an indication that both parties have no further grievances and that the settlement is satisfactory and mutually acceptable - a concrete symbol of the consensual nature of the solution. This is also found to be characteristic of the "informal" judicial activity in Bunyoro in which Beattie (1957) says the joint feast that follows the proceedings, may be seen as a device for re-integrating the offender into the community. The functions of compensation are only meaningful when discussed in relation to the main object of the proceedings in the chiefs' courts, which is to reconcile the parties in dispute and to place the relationship back to normal.

The main point is that the new legal order has made it difficult for the chiefs to continue using compensation as a way of promoting reconciliation between parties, because the chiefs' settlements cannot by law be enforced, except where the parties are willing. That is, the law prohibits the chiefs to exercise judicial powers and in that sense they cannot impose sanctions except where the parties themselves are willing to give in to the settlement made by the chiefs. As the earlier descriptions suggest, in most areas of petty offences, the people do turn to the "unofficial" courts, and where parties agree to settling

the matter by compromise or reconciliation, with payment of agreed compensation or restitution, no harm is done, the local sense of justice is satisfied and the matter ends there. It is still, however, possible to claim compensation through the official customary law courts in a separate hearing,²⁷ as such claims are no longer held to be incidental to the original proceedings whether civil or criminal as it were in the past.

A further explanation offered by Ashton (1952) is that the penalty inflicted afforded a criterion of importance, and various courts had limitations on the sort of penalties they could impose. Where the lower authorities were in doubt; they preferred to send the case on to a higher authority than risk a reprimand for having attempted to go beyond their jurisdiction. Also the parties would be less likely to accept the decision where an authority went much beyond his powers allowed. Where an authority over stepped his powers, senior authorities had to ~~retry~~ the cases. From an interview with Damane, this procedure was quite satisfactory and where any party was dissatisfied he was allowed to take his appeal to a more senior chief until the matter reached Thaba-Bosiu, if necessary. As he explained an appeal could either confirm or dismiss the original decision as seen fit, the word of the Thaba-Bosiu appeal court was considered to be final.

Ashton (1952) further points out that certain matters such as taking up arms against another person were

specifically reserved for the Paramount Chief's Court. This was not so strictly observed and some important courts heard such cases if there was no bloodshed, and especially if the taking up of arms was no more than a threatening gesture. Junior courts could not, however, deal with cases involving the use of a dangerous weapon, they had to refer them to their senior chiefs' courts.

The jurisdiction of the courts varied widely and also corresponded with the position of the authority in the political hierarchy. Under this arrangement, the courts of the headmen and of other minor authorities could deal with every kind of cases provided they were not serious, such as land disputes if they had authority to allocate land. They could deal with cases of trespass, theft, adultery, assault, enforcement of marital and financial duties and so on (Ashton, 1952). In addition he confirms the point that there was no clear-cut definition of "seriousness", a case could be said to be serious if the issues involved were of equal or greater importance than the headman's position or when damages caused were extensive.

While clear-cut definitions of seriousness of different cases can still not be stipulated, some of the informants interviewed²⁸ explained that at present, the gravest offences such as homicide, rape, serious theft and assault would not normally be heard by the "unofficial" courts but would be taken directly to the appropriate court

in the official hierarchy. In addition, the latter hear cases in which either of a party insists that his case be taken there, or those which the "unofficial" courts fail to settle. Otherwise as the Attorney General pointed out, many disputes "likhang" are still settled by the chiefs in the villages. With evolution of new ideas about different offences, as dictated mainly by the new system of law, the Director of Public Prosecutions indicated that the Basotho people have, to some extent, come to regard certain types of cases as more serious than others. It can be argued that it is on the basis of these new notions of seriousness, that they make decisions as to what matters to refer to the "unofficial" courts and which ones to take to the official courts.

The Director of Public Prosecutions, however, further argued that the imported law has to some extent contributed to the failure to come up with precise notions of the seriousness of various offences, and also of distinctions between criminals and civil matters. He gave an example of abduction which now, unlike in the past, constitutes a criminal offence - a "very alien interpretation to the Basotho and to Sesotho customary rules" - which "clearly the people do not understand".²⁹ In his opinion abduction should be struck-off the criminal statute books, where clear intentions of marriage, as often is the case among the Basotho, are established. However, he said it should be maintained as a civil offence, unless, of course, during

the process of abduction, rape or assault occurred, in which event a person should be charged with those offences (rape or assault) and not a Sui generis offence called abduction.

The geographical limits of the courts, on the other hand, used to be in line with the political jurisdiction of an individual authority. Such jurisdiction extended over all inhabitants domiciled in each chief's area, that is, men their wives and children, who were registered for tax purposes under that particular authority, or who had lands and dwellings in that area. A court could hear cases within its civil and criminal jurisdiction in which such people were defendants or accused; whether such matters arose within that area or not. The courts also had jurisdiction over persons not domiciled within an area where matters in dispute arose within that area (Ashton, 1952). The classification of jurisdiction according to tax registration must have originated from the colonial period, as taxation was not a traditional feature of Basotho Society. The boundaries of the courts' jurisdiction always coincided with those of the chieftainship wards (Hamnett, 1975). While the system of taxation (basic tax compulsory for men) referred to above has been abolished, the other factors delimitating the geographical jurisdiction of the "unofficial" courts, mainly the political jurisdiction of individual authorities and domicil, remain important as in the past.

PROCEDURE

The rules of procedure and evidence followed by a court as noted by Maope (1986), are important in connection with the outcome of a dispute. It is, therefore, crucial to keep in mind the main purpose of the proceedings in a chief's court, in order to fully understand and appreciate the nature of the rules of procedure and evidence used therein, as they are intended towards achieving a particular outcome - reconciling the parties in dispute, restoring the good relationships which have been destroyed, and also reintegrating the offender into the community. This is done through a process that allows the parties concerned to air their differences freely. The following descriptions about the nature of the rules of procedure and evidence in the chiefs' courts should be understood in that light.

In addition, it is important to realise that there are interrelationships between the jurisdiction, the procedures and the rules of evidence, so that their discussion under separate sub-headings is mainly for analytical purposes. The interconnectedness of these variables is more evident in the case of the rules of procedure and evidence, as certain principles of procedure tend to influence the manner in which evidence is given during the proceedings. The procedures originating from pre-colonial times are still highly influential in the "unofficial" chiefs' courts, as shall be noted in the following descriptions.

While these are not set down in any written form as is the case in the official courts structure, it is evident that there are general guidelines of procedure and evidence which the conduct of proceedings in the chiefs' courts follow.

The court procedure varied slightly in different courts, the smaller the court, that is, in terms of the rank of each individual chief, the simpler the procedure (Ashton, 1952). However, as he further explains the pattern was the same throughout and the differences were largely those of detail. For instance, the Director of Public Prosecutions explained that the details of procedure in a chiefs court tend to vary with the nature of the case in hand, such as, whether the case before the court is that of adultery or assault. The headman's court is otherwise the simplest and straight-forward, while in more important courts, as Ashton (1952) notes procedure "was more complicated and formal". According to him, at least at the time he wrote, the same procedure was still forwarded in the so-called "National Treasury Courts" which constitute the present day Local and Central Courts of the customary law courts in the official hierarchy.³⁰ With time, procedure in official customary courts has become somewhat mixed as shall be described in the next chapter; with the adoption of some of the more received law principles of procedure, though this is not in all respects and appears to be so in theory than in actual practice.

Another point of procedure which Ashton (1952) points out is that, the common practice was for the parties to announce their presence on arrival on the day of the hearing and then sit to await their case to be called. Entering the court through its defined entrance, the attendants would raise their hats and salute the chief or president, whatever the case might be, and the men about him. People of some political or social standing would go to the president and other members of the court, to shake hands and exchange greetings. This is normally the way the Basotho greet each other, especially when meeting at some important gatherings - men raise their hats and handshaking is very common at such occasions. The defendant and his friends and witnesses would then go to one side of the court, where they would sit together, the plaintiff and his party would occupy another side.

By tradition women were not allowed into the court, and those involved in a case had to sit outside, near enough to the palisade to be seen and heard by the president, and for them to hear and see him. The exception was at Matsieng, the Royal village, where the courts were purely places of official business and lacked the social association of the courts of smaller authorities. Here, women sat in the middle of the court while being examined; but had to leave when the examination was completed (Ashton, 1952).

From the information gained through the interviews it

can be deduced that the common practice is still that only men take active participation in the proceedings of these courts, and that while age is still not an important criterion for participation, it is increasingly becoming difficult to find young men in the "unofficial" courts, as many of them now go to school and others to the mines in South Africa, a point mentioned earlier on while discussing attendance in these courts. In many instances, chances are also that some of the young men are in employment outside their own villages of domicile, often in the districts' headquarters, especially Maseru, the Capital town.

With everyone settled, the president would then call upon the plaintiff to state his case, who would then walk to the centre of the court and proceed to make his statement, following which he would call upon his witnesses to speak. He would then be followed by the defendant and his witnesses (Ashton, 1952). This is equivalent to the point made by Hamnett (1975) that the practice was for the plaintiff to make his claim and then invite his opponent to rebut it.

As a point of procedure, both sides to the dispute were normally allowed to make their statements uninterrupted save for occasional interjections by the president or his assistants' demand for further explanation or reminder to keep to the point (Ashton, 1952). It is still common practice to let the parties and their

witnesses to outline and explain the facts of their case freely, accepting a wide variety of evidence as to be discussed further later on. The parties make their statements unled, and questioning is left until they have put their case before the court.³¹ However, as indicated by other informants, for example, by Judge Molai "the court does not hesitate to stop irrelevancies of undue length and inconclusive accounts and plain lies".

The practice and procedure of allowing the parties and their witnesses to state their evidence so freely seems to be widely acceptable among many Basotho and is even supported by various Sesotho idioms. The two most famous ones are "moa khotla ha a tsekisoe"³² and "moro khotla ha o okoloe mafura".³³ These idioms as Damane explained, demonstrate the two basic principles highly valued among the Basotho; namely, "freedom of speech and that all people must have access to the court". The first one means that in court everyone present and attending a hearing in a chief's court can examine and cross-examine the parties and their witnesses, and even if one makes a mistake or stumbles the court cannot hold that against him because he is allowed the freedom of speech and expression. This is what the free airing of grievances entails. The second one, "moro khotla ha o okoloe mafura" refers to the fact that the right to examine the parties and witnesses does not only belong to the chiefs or their assistants alone. In Damane's words "it is not only for those of

reputable status" to examine and ask parties and witnesses questions, but it is for all those attending the proceedings. Thus the freedom of speech in court is not regarded as a privilege of a few but is a right of all those present. But this also implies that anyone is free to bring up whatever evidence may be relevant in a particular case, as any fact may be brought to bear as relevant to the dispute in question.

To get a full picture of how the Basotho feel about the above principles of procedure in court and to get a comprehensive view of how the freedom of speech is exercised during the proceedings, one could refer to the book of Sekese (1980) entitled "Pitso ea Linonyana, Le Tseko ea Sefofu le Seritsa".³⁴ The book shows how the smaller birds "linonyana" could place their grievances openly in court, without fear of further harassment by the bigger and stronger ones.

Having all spoken and the trend of the case clear, the parties would be examined one by one, called and recalled as often and in whatever order desired by the president and his assistants. The president of the court would be the one to examine first; followed by his assistants. Then anyone present could ask further questions (Ashton, 1952). It is in this sense that one feature of these courts is identified to be somewhat an "inquisitorial"³⁵ procedure, marked by the court's involvement in questioning the parties and investigating the case, and even the "judge"

(presiding chief or headman) does not play a passive role of an umpire. A similar observation is made in Maope (1986) for instance, that by contrast to the rules of procedure and evidence used in the official customary courts which are laid down by statute and are simplified accusatorial rules; the traditional method of settlement among the Basotho represented some kind of an inquisitorial procedure. As he stated:

A problem which has arisen is that the African litigants, being used to some form of inquisitorial procedure, do not appreciate the change, ... (Maope, 1986: 118).

The point about participation by all those present at the hearing was reiterated in an interview with Damane who explained that all those in attendance, including even a "passer-by" is allowed to ask the complainant and his opponent questions, and according to him there is open participation by all those in attendance in the attempt to reach an agreeable settlement. Some of the respondents interviewed³⁶ were of the opinion that through such open procedure, the truth is sure to come out, especially because the background facts of the case would be known by the time it reaches the court, as the story would have spread and been widely discussed by the members of the village. As indicated by Resident Magistrate Mohale, a lot of information about the case, including hearsay represented in statements such as:

I heard when I was at "Joaleng" (beer-place) at so and so's place, that such

and such happened (Mohale: 30.7.1987).

would have been passed on from one villager to another, and it is even such information that the villagers would bring up as evidence. The issue about hearsay evidence is discussed further later.

Male witnesses giving evidence or replying to question had to do so standing in the centre of the court, women on the other hand, would remain seated either in court or just outside. Those questioning witnesses did so standing in their seats (Ashton, 1952). According to some of the respondents interviewed such as the Chief Magistrate, for example, the first witnesses to be called upon would be those who were present at the scene of the cause for the dispute; but where there are elders of the village in attendance, they too would be given a chance to speak on the matter.³⁷

As Ashton (1952) further describes, normally the parties did not cross-examine their opponents and witnesses, preferring to express disagreement by snorts of indignation and to refute their evidence later by criticizing or denying it in a further statement, but they were free to examine their opponents if they wished to. In a few sophisticated courts such as at Matsieng, wealthier people used to employ special pleaders ("akhente") to help them conduct their cases, but as Ashton (1952) points out this practice was contrary to traditional theory and procedure which placed on the "judge" (chief or headman)

and his assistants the main task of sifting the evidence and arriving at the truth. There could be one reason why this was not a common practice during traditional times and this was summed up quite well in the explanations of Resident Magistrate Mohale, and Crown Counsel Ntsonyana that many Basotho are eloquent speakers, therefore, it could be argued that there was no necessity to use special pleaders to state the case on their behalf. In addition, the Chief Magistrate pointed out that some of the parties present their own cases more eloquently and systematically than some of the younger (fresh)³⁸ legal counsels are able to do.

At the end of the hearing and examination of the parties and their witnesses, the party who first adduced evidence could address the court, summing up his version of the facts. Thereafter, the other party could do the same (Ashton, 1952). As pointed above, the engagement of special pleaders should have come during the period of colonial domination, with contact with foreign systems of law and court procedure.

When the parties were through, the president and his assistants would go into committee to discuss the case, compare their findings and try to agree on their decision, on the damages to be awarded or fines to be imposed. There was no voting, the matter had to be decided by consensus of opinion. The decision could be reported to the chief (where he had not be in court himself) for

information and approval, if it was thought he would be interested. On the other hand, the decision always had to be reported to the chief in land disputes and in cases of assault accompanied by bloodshed as "mobu le mali ke tsa marena" (soil and blood are for chiefs) and he had to make the final decision (Ashton, 1952).

The procedure as described by Damane slightly differs from the above, but is not completely in disagreement. According to him it is for the complainant and his opponent to give the court a chance to review the facts of the case and to consider its decision; once the parties have tabled their matter and when all questioning has been completed. To arrive at a decision the strength of the evidence is evaluated and examined from the side of both the complainant and that of his opponent as well, pointing out at various faults committed by the parties on either side.

According to him what is sought is not:

What in English is called a "point of law", but the "point of fact" as to whether an act in dispute did in fact occur (Damane, 13.2.1987).

To illustrate this statement Damane gave an example of a case involving a fight between father and son, where the latter has hit the father with a thick stick "molamu", causing him injuries. Seeing the injuries and receiving evidence that the son caused them would suffice for the court to hold the him liable. As he went on, the issue would not be that the son should defend himself. This was

an attempt to show the importance attached to "facts" that a given act actually occurred other than "points of law" and "proof" as upheld in the western legal sense; like proving intent and so on. Examining the facts of the matter in this manner would in fact be in aid of making both parties to accept their faults, so that whatever decision would be reached is consensual, and that it would lead to their reconciliation without causing any bitterness on either side.

When deliberations were over, the court would reassemble and the president or one of his assistants, speaking in the name of the chief, would address, first the plaintiff and then the defendant, praising those actions which met with the court's approval, condemning those of which it disapproved, and finally announce the terms of the decision. If damages had been awarded or fines imposed, he would usually mention a date by which they had to be paid. After the judgement had been delivered, the parties would arise and either thank the court for its decision and accept its judgement or bewail their misfortune and ask for an appeal (Ashton, 1952).

In his autobiography compiled by Perry and Perry (1975), Jingo describes how during his days as a young boy, male children absorbed knowledge about the laws of the country without conscious effort because from an early age, they joined the men at the village "Lekhotla" (court) where they would hear disputes being settled, Sesotho law argued,

and customs discussed. He says, anyone could put questions to the disputing parties and their witnesses, and even a boy would never^{be} considered too young to add whatever knowledge he had about the case before the "Lekhotla". This is how by the age of twenty, Jingoos says he had come to have a reasonable knowledge of the law and of procedure in a chief's court. Palmer and Poulter (1972) in agreement to the above point discuss that traditionally anyone present was entitled to examine and cross-examine the witnesses. Jingoos further notes that anyone present at "khotla" was free to question or challenge a witness whose evidence they suspected; bringing even private knowledge of the case in question to bear, in order to find out a just solution.

As pointed out by some of the respondents interviewed such as the Attorney General and the Chief Magistrate, it is no longer possible to acquire the knowledge about customary law and its procedures in the manner described by Jingoos in Perry and Perry (1975). It is with the realisation of this that the Chief Magistrate called for more formal training in the area of customary law which should also be offered to those functioning in the Local and Central Courts as well. The Attorney General supported the idea that the personnel in the courts should be assisted with training in customary law and its procedures. He pointed out, however, that there is no staff even at the University of Lesotho to adequately teach

customary law in such a way that competent personnel to man even the official Customary Courts can be produced. He stressed that this is a vital area which needs further investigation especially in the light of the fact that many cases including those heard in the official courts seem to involve questions of Sesotho law and custom. In the perception of the Attorney General the chiefs are undoubtedly performing a useful job in dispute settlement, as he pointed out:

There is increasing support for the reconciliatory procedures of the chiefs' courts, as the opinion is that the so-called judicial courts cause a lot of bitterness, they have no friendship and they emphasise on the point of law only "Ho buuo molao feela" (Maope, 16.2.1987).

It is because of the consensual element of the settlement reached by the chief's court that whatever decision is made tends to be more acceptable to both parties and hence more durable for restoring good relationships. It is in this sense that the significance of these courts' contribution to the social control functions and their potential for effecting reconciliation, need to be examined especially in certain types of cases such as matrimonial disputes.

Practice and procedure in the chiefs' courts, as well as the rules of evidence (to be discussed next) should be understood in the context of the overall object of their proceedings, which is to express confidence in the man who

has erred, and to show him that he is still accepted as a member of the community, by settling the affair within the community and not outside. Sending a man to the official courts is usually regarded as signalling the community's rejection of him. The communities in the villages still feel that a dispute between neighbours is best settled within the community. In addition, the familiarity with the surroundings within the chiefs' courts increases the chance for community involvement and participation in the proceedings, and overcomes feelings of uneasiness from the part of the persons concerned which may inhibit them from "saying out" what the case is. It provides an opportunity for an open-airing of issues and grievances. That the "unofficial" chiefs' courts serve an important function is indicated in the people's persistence to seek their assistance in disputes of various kinds.

EVIDENCE

In as far as evidence is concerned, the "unofficial" courts are guided by principles, which in the literature have generally been described as vague and variable, for they are not formulated in any recognised code and their application is said to vary with the personality of those presiding over the proceedings.³⁹ The main criticism against the rules of evidence guiding these courts has been that they are similarly not written down, therefore, difficult to follow (apply). However, even in this case,

it is possible to outline the recognizable features as discussed below.

One basic principle as Ashton (1952) indicates is that, great latitude in giving evidence was allowed for various reasons. First, it was traditional for witnesses to give their evidence in a round about manner rather than directly. An example here would be when being asked one's name. In Sesotho custom the response would not only involve giving the name as so and so; but it would entail describing one's genealogical origin, the common way being to show that "I am the son (or daughter) of so and so". Family relationships and sorting one's status in the above manner is important even in dispute settlement processes, because one is seen not as an individual but a member of a community even where dispute has arisen. What is crucial is attempting to restore such relationships where they have been disturbed as a consequence of a dispute. Further examples pertain to questions relating to place and time - where and when the offence occurred, - in which it is permissible to state, for example that it was behind the mountain, or that it was during the day and also that the sun was already up. Many Basotho are still used to stating their facts in this manner, for instance, without giving the precise time according to the watch. This is still common in the official courts as well as shall be revealed in the descriptions of the proceedings in the received law courts.

Secondly, Ashton (1952) says the court was not obliged to the main issue before it, but could also deal concurrently with any other wrongdoing, civil or criminal, that may be brought to its notice during the proceedings. Thus it could hear evidence which, though irrelevant to the immediate or main dispute, could bear on any such wrongdoing. An example would be where a case of "fighting" before the court has occurred because of a long-standing feud between two groups of herd boys over grazing land. Even if the latter is not the point of the current dispute, once brought to the court's attention, it could also be resolved.

From the discussions with some of the informants this wider airing of grievances is facilitated by several factors. First, the hearing takes place soon after a breach has occurred, while everyone involved still has the events fresh in mind and can, therefore recall many facts easily. This is because police investigations are not involved; therefore, the time between the breach and the hearing is shorter than in cases going to the official courts. Secondly, a feeling was expressed that the familiarity with the surroundings in which the hearing takes place, and participation by all people in attendance does not inhibit nor intimidate the parties from airing their grievances openly, as might often be the case especially in the received law courts, where robes, writs, messengers (who sometimes are uniformed police) and other

symbols of power subtly remind one of the physical force underlying the proceedings. Thirdly, since the investigatory initiatives rest with the parties themselves, more grievances existing between them are aired and adjusted, since they know well what the root causes of their dispute are. Finally because hardly anything mentioned is held to be irrelevant, this leads to a more thorough ventilation and sifting of the issues.

As mentioned earlier, those present would also bring their own private knowledge of the case in question to bear, in order to find out a just solution. The chief as well would by question and answer, seek to elicit the facts of the case and break down false testimony (Perry and Perry, 1975). This goes back to the point made by Damane as mentioned earlier, that points of "fact" and not so much of "law " are the basis of proceedings in the "unofficial" courts. The main issue is to get evidence revealing sufficient facts on which to base a decision, rather than whether certain legal procedures have been followed in obtaining such evidence, or whether the evidence given falls within typical rules about what constitutes or does not constitute acceptable evidence. As pointed above, nothing brought up in the proceedings of the "unofficial" court is ruled out as irrelevant. It is this fact which explains the acceptance of hearsay evidence even in the customary courts as shall be raised fully in the next chapters.

For instance, as pointed out by Judge Molai; "in the now so-called administrative courts, hearsay evidence is accepted. People are referred to the 'Courts of Law' on [the basis of] such hearsay evidence, when they reach there, they find that such evidence is not accepted." As he pointed out, this leads to confusion on the part of the parties. Furthermore, he said that one only has to look at the papers from the chiefs' courts to find out and to see how much hearsay is contained; he went on:

You will find that all sorts of what you would consider inadmissible evidence has been taken, and that a man was referred to the Local Court most probably because of that type of evidence. It may be that the people in the villages do not understand why we [official courts not accepting hearsay evidence] should operate in this manner. May be they are right when they say things have changed ... especially when you come to the question of evidence (Molai, 3.3.1987).

Hamnett (1975) also offers an explanation which affirms the point about the acceptability of hearsay evidence in the "arbitration courts", especially if the witness is held reliable. He relates how one village headman once stated that as the chief's counsellor, he knew the village's affairs and how this headman's indirect knowledge of events leading to an act of arson was relied upon by the court. In addition, he shows how in another case a judge relied upon his own personal knowledge of a boundary in reaching his decision in a land dispute, an indication of the limited role-differentiation in the

traditional setting; one could be an observer, actor, leader, all at the same time. In the case referred to above the chief was a judge and a witness as well.

The evidence of an eye-witness was regarded as the best (Ashton 1952), hence the procedure, as pointed out by the Chief Magistrate, for instance, is that the first witnesses to be called upon would be those who were at the scene of the cause for dispute. But, however, hearsay evidence would be admitted, particularly if repeated by independent witnesses or if the alleged source of the information was unavoidably absent (Ashton, 1952). Damane, in an interview, provided illuminating examples showing how hearsay is commonly accepted in the chiefs' courts. He said, for example, in a case where a girl has fallen pregnant, and the young man who is alleged to have responsibility is denying it, if when questions are put it emerges there is even a slightest indication that someone knows the two parties to have been somewhat involved, such evidence would be held as pointing to the fact that the young man is liable. As Damane further expressed:

a case could be decided on the basis of
"malume" hearsay only (Damane:
13.2.1987).

But as he further explained, a lot of questions would be put to the young man, and if hearsay continues to recur, that would be regarded as sufficient ground for the court to accept it as viable evidence.

Another kind of evidence often accepted is

circumstantial evidence. The fact that a man was found alone with a married woman whom he is known to be fond of, or was seen coming out of her hut or court-yard, could be taken as evidence of adultery especially if supported by other evidence. A special type of evidence was the confession, and if a person admitted liability on apprehension or at some time prior to the hearing, his admission counted heavily against him. If he consequently retracted he would have to produce stronger evidence to prove his innocence than he would otherwise have had to (Ashton, 1952).

As mentioned earlier on when discussing practice and procedure in the chiefs' courts, it is upon the parties themselves to take up full control and initiative in the proceedings and in bringing important evidence in their cases. It was also noted that questions of legal representation are contrary to customary rules of procedure as the Basotho believe in the concept of doing things on themselves as represented in the expression that "ha e anyese ka mokukutoana, 'Ngoan'a eona a le teng".⁴⁰ The point about the absence of legal representation can be understood as contingent upon the approach to dispute settlement which Muli (1982), for instance, calls the "self-help" approach; which she defines as a procedure whereby the injured party takes the initiative in seeking redress whenever breaches of customary law occur. This, as she further explains, can be understood within the context of the general social fabric in which breaches of

norms of social behaviour involve the people concerned in the attempt to solve and control such behaviour. In addition, it can be understood in a context in which an offence is a harm against persons rather than as harmful acts against a legally constituted authority like the state. The people themselves then, and not the state are the ones engaged in resolving the disputes occurring among them, they are also responsible for bringing before the court all the evidence they feel relevant and also for obtaining the witnesses.

Thus the rules of evidence and of procedure in the "unofficial" courts can only be fully understood if examined as part of the wider social structure, general roles, relationships and group activities of the Basotho people living in the villages, who form the majority in the population. Dispute settlement at that level is not based on "legal rules" as generally understood, but there is, however, a systematised way of dealing with disputes and retaliative sanctions backed by authority based on tradition and custom (cf Bohannan, 1967). This seems to be in line with the argument by Roberts (1979) that responses to disputes vary from one society to another, and that these are closely related to the values and beliefs held in a society; just as what constitutes a dispute is dependent on such variables.

ARE THE CHIEFS' COURTS REALLY "UNOFFICIAL"?

In the foregoing descriptions, it has been

demonstrated as gathered both from the literature and also from discussions held with different informants, that while the popular line of thinking is that the "unofficial" courts possess no judicial powers in the strict legal sense, and that as such their decisions cannot be enforced, in contrast practice reveals that these courts, which originate from pre-colonial times continue to function, and that people in various kinds of disputes turn to them to seek remedy.

Both the literature and the data collected during the field research show that the "unofficial" chiefs' courts are still performing an important role in dispute settlement, however unofficially or illegally. For instance, Hamnett (1975) says that, these courts are "without statutory powers" to engage in dispute settlement, and they only function where the parties are willing to give in to the settlements given by the chiefs. As Ashton (1952) also alleges, the chiefs' courts can only function as "Courts of Arbitration", a point reaffirmed by Palmer and Poulter (1972) as well. It is in this sense that the existing literature has portrayed a view, that the chiefs' courts are "informal"; that is, they are not, in legal terms, recognised as part of the official judicial hierarchy. However, the fact that these courts exist and do operate, is not disputed. The point in argument here is that, in practice they actually function as an underpinning system and in close relationship with the

customary courts, and thus as part of the overall judicial system. This issue is discussed further in the next chapter. But the point of departure is that, this makes the "unofficial" courts less "informal" as often suggested. The most astonishing fact, however, is that the presence and persistent operation of the "unofficial" chiefs courts is accepted even by the legal professionals. In this light, the purpose of this section is to examine in much greater detail how this leads to the understanding of how far these courts can be held as "unofficial" and how descriptions in this chapter contribute towards a better understanding of the nature and processes of dispute settlement currently prevailing in Lesotho.

As also already indicated, provisions rendering the chief's courts "unofficial" and unrecognised judicial institutions, came with the attempt to create a distinction between the "administrative" and the "judicial" functions of the chiefs,⁴¹ which, as revealed in the foregoing descriptions, the people up till now can still not fully comprehend nor appreciate. As a result, they continue to consult the chiefs' courts whenever they are engaged in disputes of various kinds with one another, as was the custom in pre-colonial times. For as indicated by the Director of Public Prosecutions, and reaffirmed by Resident Magistrate Mohale, to a large extent, the practice is still that everything that happens in a village; including disputes, gets reported to the chief. This as the

Director of Public Prosecutions explained, is the traditional way of doing things among Basotho, and as he further expressed "it would be very primitive" to regard it as merely an "informal" practice and not an accepted way of doing things.

The discussions held with various informants⁴² during the field research, tended to reaffirm the allegations that, the decisions of the Chiefs' courts cannot be enforced, nor can they be held as final or binding, nor be enforced by the infliction of fines or any other sanctions. This was in a way a reaffirmation of the opinion that the "unofficial" courts have no judicial powers and that they are not recognised by statute and, therefore, that their decisions have no force of law. Yet, on the other hand, it became clear from the statements of these informants, that many disputes are settled by the chiefs' courts and never come before the officially recognised courts. The implication is that in such cases, the disputes are successfully resolved, with the concerned people accepting the settlements given by these courts. Thus in those circumstances, the argument about the decisions of the chiefs' courts having no force of law and so on, is rendered purely a theoretical speculation.

Quite clearly in strict legal terms, the chiefs' courts do not exist except in their capacity as "administrative" institutions. But a wide variety of information as indicated above point out that, a number of

people still voluntarily approach the chiefs' courts when they are in dispute and also give in to the decision made by them. Thus, in such case, the argument that the decisions of these courts cannot be enforced by infliction of fines or other sanctions, does not even arise. Moreso, it has to be recognised that a "fine" in the traditional sense as Muli (1982) indicates, is aimed at restoring a troubled relationship rather than to "punish" in the penal law sense. Thus what is important is the fact that whatever settlement is given, it should have the potential for restoring the relationship between the concerned parties back to normal. That, for them, is the crucial aspect than the issue of a settlement having the force of law. If they are so satisfied, they willingly accept the settlement, and by such virtue, the decision of the chief's court becomes final; with no further recourse to the official courts. The only problem that arises is when a criminal offence or civil dispute is regarded as too serious, or when the parties do not agree to settle a matter before a chief's court, in which event the involvement of the official courts is unlikely to be avoided. In fact, many of the informants such as the Acting Chief Justice; the Attorney General; Resident Magistrate Mohale; the Chief Magistrate and others; outwardly admitted that the chiefs still play an important role in the settlement of minor disputes; mainly civil matters as most of the criminal jurisdiction has been

removed from them by statute; although they still deal with minor criminal offences, examples of which are given earlier.⁴³

Although it cannot be estimated in exact terms from the present data, as to in how many cases the parties agree to the intervention by the chiefs, it is clear as the Attorney General pointed out that many "likhang" disputes are settled by the chiefs. With the evidence presented earlier on there is all reason to conclude that many do accept settlement from the chiefs' courts; and there is also enough reason to believe that it is only when the settlement is not acceptable to the parties as the Acting Chief Justice explained, that most minor cases are "passed on to the customary courts".

In trying to explain the fact that the decisions of the chiefs' courts cannot be enforced by law the Attorney General said:

The chiefs can only make a recommendation. If the people are not satisfied with the manner their dispute has been handled, the concerned chief can write a letter, forwarding the case to a judicial court (Maope: 16.2.1987).

While attempting to show that the chief's court cannot make a definite decision on a judicial matter, the above statement at the same time admits to the fact that in instances whereby the parties are agreeable to the settlement by the chief, such "recommendation" actually becomes final; with no need to refer the matter further.

Further it demonstrates the close working relationships between the "unofficial" courts and the customary courts which was mentioned earlier on.

A further interesting observation is that, while it is generally admitted that the "courts of arbitration" have no judicial powers, and as Resident Magistrate Mohale put it, that as such they are debarred from adjudicating on any matter, of any kind, it appears no action has been taken against the chiefs taking judicial decisions. Section 21 of the Proclamation 68 of 1938, which makes it an offence to adjudicate without statutory powers, has thus remained totally ineffective. Hence the practice of the chiefs' courts to deal with "judicial" matters in addition to the "administrative" ones has continued unabated, making the argument that the "unofficial" courts have no powers to settle disputes a practical fallacy.

This brings to show that what happens in practice is obviously quite different from what the law theoretically prescribes. It is a clear indication that practice does not fit the law. The point is that whether or not the chiefs' courts possess any judicial powers; they do in fact engage in dispute settlement and have been permitted to do so for various reasons as outlined further below. This, as shown earlier on, was admitted by the informants themselves, some of whom are legally qualified professionals. The Attorney General, for example, admitted that the chiefs do in practice exercise judicial

powers and that many disputes are actually settled at that level. The main reason why this still happens as discussed earlier is that many people still do not understand or cannot appreciate the fact that there has been a separation of powers, and that the chiefs' courts under these circumstances have no judicial powers. In practice, therefore, the chiefs continue to play both roles as they did before, they "administrate" and also adjudicate. With all the good intentions behind the idea of "separation of powers" as Resident Magistrate Mohale discussed,⁴⁴ the "administrative" and "judicial" functions of the chiefs' courts remain fused to a large extent. This is a reality recognised even at the official level.

This practice is not only recognised, but is also accepted as a normal way of action. For as the Director of Public Prosecutions stated in his explanation referred to earlier on, reporting to the chief everything that happens within the village is an established and traditional way of doing things in the Basotho Society and as such, it cannot simply be regarded as an "informal" practice but as an acceptable way of doing things, which he called the formalisation of the otherwise "informal" procedure. But even further as the Chief Magistrate argued, this is not only an established practice, rather it is in addition a necessary step which proves advantageous for the people in a number of respects. According to him, it is necessary to attempt to settle disputes before the

chiefs' courts thus employing the cheapest means available; before coming to the official courts where the people have to pay expensive legal costs and court fees, for their disputes to be attended to.

More reasons were offered as to why the people continue to use the chiefs' courts for "judicial" purposes. The Acting Chief Justice, noted the close proximity of these courts to the people, which is an advantage to the people living in the villages. In addition, he said that these courts are more "personal"⁴⁵ and employ procedures that the common people are able to follow. This was confirmed by the Attorney General that the chiefs' courts are much more sympathetic to the people's causes for dispute. As he put it the chiefs are much more prepared to listen to their people. The point about the rules of evidence used in these courts does confirm this statement because as Judge Molai indicated, various things are brought up as evidence in the chiefs' courts including even hearsay which is admissible at that level. It has been explained why this is acceptable procedure in the chiefs' courts - it is a procedure for airing grievances between two parties in an attempt to reconcile them.

A further explanation offered as to why the chiefs' courts are still in a position to deal with the settlement of disputes especially with civil matters is that such matters, more often than not, touch upon aspects of Sesotho custom, which some of the courts, for example, the

Magistrates' Courts as Resident Magistrate Mohale pointed out, are unable to address satisfactorily. As he argued, the Magistrates' Courts fall short of dealing with the day-to-day kinds of disputes arising out of the daily lives of the Basotho people. This point is illuminated by descriptions indicating the sort of disputes handled in the received law courts as contained in Chapter 5; which are of a different kind to those brought to the "unofficial" courts.

Another illuminating point was offered by the Attorney General that:

Many disputes are still handled by the chiefs and the families. I have a suspicion that people do not go to the courts [official ones] because they are scared. The judges have no mercy to disputants, and that makes them even more scared "baahloli ha ba na mohau ho batho, joale ba ba tsabisa le ho feta." They have no mercy of helping the disputants and guiding them in how they should conduct their disputes. A judge does not care to look at the evidence presented as regard the cause of dispute "O se a kharumela feela" he immediately shouts at them [parties]. He scares them even more. (Maope: 16.2.1987).

This adds to a point the Attorney General is noted to have stated earlier on, that the chiefs' courts, on the other hand, tend to be more sympathetic and understanding, hence the people's preference to seek settlements there, wherever possible.

The foregoing descriptions show that in reality the chiefs' courts are not as "unofficial" as often portrayed.

That the claim that they have no judicial powers, seems to exist largely in theory. In practice, they are recognised and accepted as part of the overall judicial process.

CONCLUSION

The most obvious conclusion that can be made in the light of the descriptions contained in this chapter, is that the study of the "unofficial" courts is relevant to the general understanding of the social organisation of justice and judicial processes now prevailing in Lesotho.

There is ample evidence showing that these courts do not only exist and operate, but that they do so in connection with the official customary courts. This alone suggests that these courts cannot be regarded as functioning in an "unofficial" capacity, rather that they function as part of the overall judicial system and complement the officially recognised court structure. In other respects of course, these courts form a different though not a competing subterranean system of dispute settlement and peace-keeping at work in the country. This is quite obvious, for instance, when one looks at the jurisdiction of these courts in which they do not compete with the customary courts but instead, deal with minor cases which often do not get reported to the police and thus never come to the official courts.

Thus quite contrary to the picture of the judicial system of Lesotho which is depicted as dualistic in the

literature, the "unofficial" courts form a third element in the courts hierarchy; in addition to the officially recognised court structures consisting of the customary courts on the one hand, and the received law courts on the other. True the literature does accept the existence of the "courts of arbitration", but their importance and the crucial role they perform in dispute settlement is not adequately addressed and emphasised. The explanations for the continuing existence of these courts lie in the fact that they are composed of and meant to operate within different sets of social relationships existing among the people in the villages. They form a distinct forum with its own perceptions of justice and its own methods of securing it which are meaningful in the village. What this means is that "justice" in Lesotho operates within a developing system marked by continuing organisation of alliance and a certain amount of symbiotic relationship between different values and loyalties, originating partly from the indigenous ideas on the one hand, and the new received⁴⁶ legal order and its institutions on the other. The two are, however, not always in conflict with one another as further explained below, and also in the next chapter.

The "unofficial" chiefs' courts in Lesotho operate under the authority of traditional leaders (chiefs or headmen) having "administrative" jurisdiction over their respective wards in the rural areas still governed by

indigenous law and custom. These courts operate not merely as adjuncts to the Local and Central Courts, but complementary to them, assisting by handling minor disputes voluntarily brought to them by the people, therefore, should be seen as part of the overall judicial machinery.

The village form of social organisation provides a general framework and key to understanding the way justice is practised and secured there, and should be perceived in that context. This analysis recaptures the inherent differences in the social structure surrounding the "unofficial" courts and the manner in which they operate; as against the nature of dispute settlement in the official courts; more so in the received law courts, because the "unofficial" courts share a lot of characteristics especially in terms of procedures and rules of evidence with the customary courts. But the purpose has also been to show that while the official and the "unofficial" courts differ in practice they do not work as totally separate entities, but rather, have developed a kind of mutual interrelationship and interdependence. For instance where the chiefs fail to resolve the disputes, they pass them on to the official courts, through a process described by the Attorney General as "writing a letter" forwarding the case to a judicial court.⁴⁷

There is limited work published regarding how these courts function. An attempt has been made here to make use of whatever literature is available and to complement

it with the information obtained from oral histories and interviews conducted during the field research, to arrive at a comprehensive statement and explanation of how proceedings are carried out and decisions are made in the chiefs' courts. In this regard they have been found to mainly adhere to procedures that obtained in pre-colonial times with some changes in areas such as jurisdiction in particular. The conclusions reached out of the analysis suggest that "rules" as such are not fundamental to this system of justice though general guidelines of procedure can be summarised. The familiar formal law model; linking "facts" to rules to deductively arrive at a legal decision seems not to apply here. Rather decisions about what rights to enforce on behalf of any party rest heavily on judgements of individual characters of the parties as derived from the participants' knowledge and impressions about the dispute before the court. Dispute settlement at this level takes into high consideration the relationships existing between the parties, the relationships which are likely to continue thereafter by virtue of the parties living in the same neighbourhood.

As Colson (1974) notes, such assessments of character as the ones mentioned above, often figure predominantly in the public sanctioning of behaviour in groups which are marked by *Gemeinschaft* values. She notes that the importance of such judgements of character in adjudication is related to the primary public concern with not so much

what a person has done in a particular instance, but rather, with what kind of person he is and what, accordingly can be expected of him in the future. The emphasis on the individual and not the alleged offence as such; and the central aim of court process, is to prevent the breaking down of relationships and to make it possible for the parties to live together amicably and in good neighbourliness in the future. Therefore, the courts' function tends to be reconciliatory, striving to effect a compromise acceptable to all parties and every one in the audience.⁴⁸ This is the main task of the chiefs' courts.

It is this task which also tends to influence what can properly be regarded as being in dispute and what is to be regarded as relevant and acceptable evidence. The broad inquiry "airing of grievances" and consideration of the relations between the parties is, therefore, at the heart of the proceedings in the chiefs' courts. The courts' conception of what is of "relevance" is very wide and does not fit with the refinement of pleadings in the "official" courts' model of adjudication; as discussed in the next two chapters.

CHAPTER 4

THE OFFICIAL COURTS 1 : THE CUSTOMARY COURTS STRUCTURE

The customary courts form the first level in the officially recognised judicial structure. Presently they consist of the Local Courts, the Central Courts, and the Court of the Judicial Commissioners.¹

The descriptions focus on how these courts emerged, how their titles, constitution and powers have changed over time, although on the whole they have maintained the character of when they were originally introduced,² for example, in terms of their structure. The main argument in this regard is that the customary courts are somewhat different in character from the "unofficial" chiefs' courts, although consequently this tends to be so in theory more than in practice.

Attempt is also made to show how the customary courts operate, and their relationship to both the "unofficial" chiefs' and the received law courts. These courts in their original aim were intended to replace (phase-out) the old Chiefs' courts,³ and become the courts of initial jurisdiction. Many aspects and the principles according to which they are meant to function, resemble those of the western Anglo-American court systems. It will be demonstrated that there are, however, certain constraints and circumstances preventing them from working as was intended, so that in practice a lot of features from the "unofficial" courts, as discussed in the previous chapter, apply in the customary

courts as well, in addition to some of those obtained from the western-oriented systems.⁴ It is therefore argued that these courts represent a hybrid system in which there is a blending of features originating from dispute settlement systems different in character.⁵ Thus while these courts can be regarded as "nonindigenous", they are at the same time they are not totally the same as the received law courts, although they both form the officially recognised court structure.

Further this chapter argues that there is a kind of symbiotic relationship or continuity which exists between the customary courts and the "unofficial" chiefs' courts, represented mainly by the fact that in practice the two appear to work hand in hand and not as totally separate entities. For instance, it will be demonstrated that the customary courts deal with cases which prove beyond the capability of being resolved by the "unofficial" courts,⁶ referred to them by the Chiefs, and in other circumstances by the police.

The chapter begins by focusing on the reasons⁷ that formed the basis for the introduction of this court structure. The descriptions focus mainly on the period 1938 onwards, although as discussed earlier, the legal and judicial changes were introduced in stages from 1868 when Lesotho became a British Protectorate and was annexed to the Cape Colony in 1871. The changes continued subsequent to the handing back of the Territory for direct administration by the British in 1884, throughout to the attainment of responsible government in 1966. Since then minor alterations have been introduced

into the customary courts system, however, without any significant change to the overall trend prompted by reforms that took place during the colonial era. The 1938 reforms remain the main radical changes that set forth extensive transformations into existing mechanisms for dispute settlement.

THE EMERGENCE OF THE OFFICIAL CUSTOMARY COURTS

This section traces the beginnings of the customary courts, focusing on the major changes and areas of difference, which contrast those known under the "unofficial" system for dispute settlement. A note should be made that many of the aspects described here have been maintained in the present day, although the courts administering the customary law have now been embellished with new titles.⁸

The Native Courts Proclamation and the Native Court Rules⁹ were intended to deal with the problems that existed in the old chiefs' courts and to tighten the position of dispute settlement processes as it had prevailed under indigenous practice. These two legal instruments transformed even the structure set up in 1884, in which the imported law was to be practised only by the courts of the Resident Commissioner; and his Assistant Commissioners based in the districts, while the customary law was to be administered in the traditional courts of the chiefs (cf Poulter, 1979). According to earlier descriptions,¹⁰ even following the disannexation of Lesotho from the Cape in 1883, provision was made for customary law to continue being administered in cases between

Africans by the Chiefs' courts. This position was to change as a consequence of the Proclamations mentioned above.

The first,¹¹ brought about the need for immediate reorganisation of the existing courts in terms of structure, recognition and jurisdiction. A new title of Native Courts was conferred on them. The Native Courts System was divided into three classes: the Paramount Chief's Appeal Court at the apex, followed by the chiefs' courts (Class A), and at the lowest level were the courts of first instance (Class B).¹² In addition, under this Proclamation, the recognition of these courts was through warrants and their powers in terms of what cases they could and could not handle, as well as the penalties they could and could not impose, and their geographical jurisdiction were stated in the same. The main aim was to distinguish the powers of the chiefs in dispute settlement, leaving the rest of the chiefs' courts only as "administrative" institutions, in accordance with the provisions of the Native Administration Proclamation No. 61 of 1938. What is important to realise is that it was no longer the chieftainship but award of a warrant by the Resident Commissioner which established and conferred judicial authority over a court. However, as Hamnett (1975) indicates, the granting of warrants to all the 1,340 chiefs and headmen in 1938, served to obscure the basic principle that actually administrative recognition by warrant bestowed authority to engage in judicial functions. The Resident Commissioner, as stated in Palmer and Poulter (1972); in addition, exercised control over the number of the courts,

as well as the personnel in them. In accordance with the Native Courts Proclamation of 1938, he could suspend or even dismiss the members of the courts, with the approval of the High Commissioner.

As pointed out by Bereng in an interview, when the Native Courts System was first set up with appeal courts in each district headquarters, it "brought a great deal of relief to the nation as a whole",¹³ as it assisted in relieving the problem of delays which had become a marked phenomenon especially in the Paramount Chief's court at Matsieng.¹⁴ In addition, it meant the people no longer had to travel the long distance to Matsieng.

As already pointed out above, at the beginning all the 1,340 chiefs and headmen whose names appeared in the first official gazette¹⁵ were granted warrants to act as judicial courts as well; so that the year 1946 saw the initial reduction in the number of courts, as the first real attempt to separate the "administrative" and "judicial" functions of native authorities was effected. These courts were then reduced to 121 (Ashton, 1952; Bereng 1987; Hamnett, 1975; Palmer and Poulter, 1972). In 1949 the number was further reduced to 106 (Ashton, 1952; Palmer and Poulter, 1972). This time, as noted by Bereng, consideration was no longer taken that the distances people travelled to the courts should be kept short, attention was on maintaining what he called 'a reasonable number of courts',¹⁶ in order to keep the costs of running them minimal. By 1964, there were only 56 lower courts which together with a dozen appeal courts made up a

total of 68, by this time the system had been entirely detached from the chieftainship, although as before, many chiefs were still acting as presidents (Hamnett, 1975).

This suggests that the practice was still to some extent in contradiction with the 1958 Basuto Courts Proclamation which actually disqualified the chiefs from serving as presidents of the courts. The relevant section read as follows:

No principal or ward chief shall be appointed as the President or as a member of office of any Basuto Court; and no chief or headman shall be appointed as the President or as a member or officer of a Basuto Court the area of which, falls within the area under his administrative control [sec. 18, Proclamation No.23 of 1958].

The reduction in the numbers of judicial courts in 1946, came subsequent to the establishment of the Basutoland National Treasury.¹⁷ Palmer and Poulter (1972) point out that the setting-up of the National Treasury necessitated a careful scrutiny of the number of customary courts the country could afford. According to Bereng (informant), the Treasury started operating on 1 April 1946; with its headquarters at Matsieng, and brought with it new trends in the functioning of the courts. The proceeds from the fines "likahlolo" collected in the newly established courts were to be deposited with the Treasury, and so were all funds collected from the sale of stray stock, which were to cease being the property of the chiefs. The presidents of these courts were public servants¹⁸ paid salaries and so were their clerks. The higher paid officials belonged to the Paramount

Chief's Court. To facilitate the work of the Treasury, the accountants in the districts were, in addition to their normal duties, charged with the duty to check on the monies brought by the clerks from their respective courts each month end. The court clerks were, on the other hand, given register books for civil and criminal cases as well as receipt books. As Bereng further indicated, these funds were to be used to pay the salaries of the court personnel, and for other purposes in the Paramount Chief's Government. This was intended to reduce the presidents' dependence on the fines collected in their courts; a criticism raised against the chiefs' courts.¹⁹ The Treasury ceased to exist on 31 March, 1960; as constitutional reforms in preparation for independence (self-government) began.

The Native Court Rules, of 1946, which appeared as Part IV of the new edition of the Laws of Lerotholi, on the other hand, were largely based on existing customs to which they had given greater precision and definition, and added new formalities such as fees and writs (Ashton, 1952). For example, the Rules provided that the plaintiff must pay a fee of 5 shillings to "open the court"; another for summons to each witness; and also for each day a court messenger is used. The new rule was that only having paid these fees, could the day for the hearings and summons be sent out, the former by the clerk of court and the latter by the messenger of court. The details of how much is paid in the present day do not matter so much, what should be recognised is the spirit behind the whole practice, mainly that justice was no

longer to be free as accustomed in the indigenous system.

The new practices, as pointed out in the autobiography of Jingoos (Perry and Perry, 1975), created much confusion since, for instance, many chiefs who could not read nor write fell behind in their work, and were bewildered by the new instructions which accompanied the radical changes in court procedure, whereby statements and answers to questions had to be recorded in writing, and monthly reports had to be submitted by each court. As indicated by Bereng in an interview, on several occasions when the clerks of court deposited funds collected and submitted their books for checking by the accountants, they were found "not to balance", because of the misappropriation of funds by some of the court officials, whom as he expressed it "used to lend themselves part of the "fines" and "compensation" funds collected in their courts".

Another new aspect in these courts, as already hinted, was that the presiding authorities were no longer chiefs but court presidents, and those chiefs elected as presidents were deliberately appointed to courts outside their administrative wards; so that the two no longer coincided.²⁰ Even the commoner presidents were not usually expected to hold a court within the wards of their own chiefs. In 1946, the presidents, two assessors, two clerks of court and messengers²¹ of each recognised court came to be paid a salary which varied depending on the importance of each court. According to Ashton (1952), the system of assessors was actually meant to stabilise the traditional practice of

panels; with the hope that together with the paid presidents this would affect the flexibility of the old system,²² and discourage voluntary attendance of local leaders who used to share the responsibility of conducting court business, hearing and deciding cases. The system of assessors as shall be pointed out later on, has fallen out of practice²³ except in the Judicial Commissioners' Court.

Through the Native Court Rules, the clerks of court were also vested with the duties to write out orders for the appearance of witnesses, to keep records of cases, to check payment of fines and carry out the general clerical routine of court work. As Ashton (1952) reports, the clerks rarely took part in the actual hearing of cases, except to record evidence. In the smaller courts, however, they occasionally helped to try cases. As he further points out, the clerks were occasionally helped by one of the "banna ba lekhotla" men of the court and even by the president. Allowing assistance by the "banna ba lekhotla"²⁴ can be interpreted as representing an element of continuity in practical terms, between the customary courts and the indigenous system.

The jurisdiction concerning sentencing powers and the type of cases to be handled at each level of the court structure came to be defined, to exclude offences in consequences of which death is alleged to have occurred, or which are punishable by death or life imprisonment, such as murder, rape, treason. Civil cases dealing with marriage other than marriage "Contracted in accordance with Native Law and custom, except wherein and in so far as the case concerns

the payment or return or disposal of dowry", fell out of these courts' jurisdiction. Also excluded was all law other than Native law and custom, "not repugnant to justice or morality or inconsistent with the provisions of any law in force in the territory". The High Commissioner was given the discretion to confer upon a court, jurisdiction "to enforce all or any of the provisions of any law". An example here would be that by 1949, the Native Courts had been empowered to try cases of tax default arising out of the Native Tax Proclamation, and infringement of the Regulations for Compulsory Dosing of Sheep and Goats.²⁵

As stated by Maema (1985) the "repugnancy clause"²⁶ referred to above; actually implied that customary law was allowed to operate under the moderate supervision of the colonial government, and the machinery which had for a long time served as the traditional apparatus that incorporated the customs and norms regulating social behaviour; was put under scrutiny by people of a different cultural background. Under the circumstances the customary law could not be held to be in its original character, but one infiltrated by aspects deriving from supervision by the colonial power and thus different from the one that existed in the traditional times, or even as understood and practiced in the "unofficial" chiefs' courts. The relevant section presently reads as follows:

Subject to the provisions of this Proclamation a Central or Local Court shall administer (a) the native law and custom prevailing in the Territory, so far as it is not repugnant to justice of morality or inconsistent with the

provisions of any law in force in the Territory.²⁷

This, as Resident Magistrate Mohale explained, means that the customary law cannot, therefore, be administered as it prevails but can only be administered if it is in harmony with the colonial standards of justice and/or morality as directed by the received law. It means, therefore, that both the received law and the customary law are not at par.

The latter is subjected and restricted within the rules and principles dictated by the former. These arguments, carry a similar message to that raised in Comaroff and Roberts (1981), relating in general, to the issue about the appropriateness of judging the character and function of law and of dispute settlement in non-western societies, using definitional standards derived from western legal models; which has been the tradition in legal anthropology.

The foregoing descriptions also, raise a question whether the relationship between the customary courts and the received law courts can adequately be described as marked by parallelism.²⁸ In order to comprehend the relationship between the two, it is necessary to place it into historical perspective. First, it is crucial to note that the General Law Proclamation²⁹ which was pronounced following the disannexation of Lesotho from the Cape Colony, provided that the Law to be applied in the Territory would be "the same law for the time being in force in the Colony of the Cape of Good Hope". A simultaneous provision was made, for indigenous law to continue applying in two instances. First, in

matters between "natives", and secondly, in all matters in the "native courts". Commenting on this position Palmer and Poulter (1972) said:

It may therefore be stated categorically that so far as the African inhabitants of Lesotho are concerned, African law stands basically on an equal footing with the common law. In no sense is the customary law placed in a fundamentally inferior or subsidiary position as it is in some other African countries, e.g. Botswana and Swaziland (Palmer and Poulter, 1972: 99-100).

However, as indicated by Maope (1986), the contention by Palmer and Poulter (1972) above is not absolutely correct.

As he argues further, at the original negotiations for "protection" by the British prior to 1868, the Basotho had wished to keep internal matters within the Territory governed by indigenous law, and their wish persisted throughout the period of British domination; as the system of "indirect rule" assisted the application of customary law by the chiefs' courts. This, as Maope (1986) also observes, came to be recognised even in the 1966 independence constitution which recognised the "law" of Lesotho recognised as including the customary law of the land, with the result that in Lesotho; customary law is a legal system and not just a system of rules to be applied occasionally. This position has not been altered even under subsequent legal provisions following the suspension of the 1966 Constitution in 1970. This, however, as Maope (1986) argues, does not mean that the customary law is in competition with the received law. They are not parallel to each other at all. Rather since with

the reception of the Cape law was received the British system of government, the English Constitutional and administrative law consequently came to be the law of Lesotho, the institutional framework and concepts for the administration of justice included. The received law predominates, while the customary law operates within the terms of reference and framework of the received law.

The predominance of the received law courts over the customary courts becomes evident in examining the procedure for appeals, and also the jurisdictions of the various courts; the received law courts having wider powers - covering wider geographical areas and powers to impose harsher punishments. The High Court possesses powers to review cases from the highest customary court which is the Court of the Judicial Commissioners. The Magistrates Courts, on the other hand, have revisionary powers over all decisions of the Central and Local Courts.³⁰

Other characteristics which demonstrate the supremacy of the received law courts over customary courts, can be picked from the Basotho Courts (Practice and Procedure) Rules of 1961. These Rules provide that practice and procedure in the customary courts shall be regulated in accordance with Sesotho custom and law, and also in accordance with the Rules. However, in the event of any inconsistency between Sesotho custom and the Rules, the latter must prevail. Certain specific directions of procedure came to be laid down to include among others, first, that the president and every assessor shall apply his mind to the question under

consideration, and every president shall come in good faith to a genuine decision thereon. Secondly, that no court president shall delivery judgement in a case in which he personally did not hear evidence. Thirdly, that these courts shall not act unlawfully in contravention of Sesotho law or any other law. Finally, that the proceedings in every court shall be conducted in such a way as to give fair hearing to all litigants, including the accused person and the prosecutor in criminal cases; and all such litigants shall have the right to call, examine and cross-examine witnesses and to address the court on the merits or demerits of the matter before the court.

The Native Courts were to apply customary law, and where such could not apply, matters had to be passed on to the courts administering the received law. The Native Court Rules (1946) for instance, made provision that:

Any dispute in which European Law or trade usages are involved which in the opinion of the court, it is unable to adjudicate upon properly because the facts are not covered by native law or custom ...

had to be referred onto the District Commissioners' Courts. The Rules also laid down penalties³¹ for adjudicating without authority.

According to Ashton (1952) the limitation of the Native Courts to only three classes;³² of which two were principally appeal courts, meant that in effect the junior courts of B Class, were able to deal with all cases falling under their jurisdiction. The truth of the matter is that the

"unofficial" courts also continued functioning and clearing a number of disputes especially on the civil side. The Native Courts had to observe limitations in respect of civil disputes and could not handle cases of claims exceeding £200 for class B; and £500 in Class A courts. There were limitations in respect of criminal cases as well. For example, such serious criminal cases as theft, or assault after a preliminary hearing by the Native Courts, had to be sent to the District Commissioners' Courts for trial, and on occasion they would be remitted back to the Native Courts. The Native Courts could not try cases which had been investigated by the police unless remitted to them by the local police officer or by the District Commissioner. Civil claims for damages arising out of matters dealt with as crimes by European law based courts such as homicide or rape, could be referred to the Native Courts for settlement.

According to McClain (1962) substantial changes set up by the 1938 Native Courts Proclamation, were only effected by the 1958 Basuto Courts Proclamation.³³ As he explains these courts were given no jurisdiction over any person other than Africans, or jurisdiction to try civil or criminal cases where any of the parties or witnesses are not Africans [Sec.26]. The Local Courts had no appellate jurisdiction, while the Central Courts were given authority to hear appeals from the Local Courts [Sec.112(1)] in addition to hearing cases as a matter of first instance. The Native Courts established in accordance with Proclamation No.62 of 1938 were actually pronounced closed; with effect from the date of

commencement of Basuto Courts Proclamation No.23 of 1958, and their warrants were cancelled. With the 1958 Basuto Courts Proclamation, one sees a further tightening of the judicial system, with the intention to remove it even more from the system that existed traditionally.

The Proclamation, however, left the headquarters of the Central Basuto Courts at Matsieng (the Royal village), which aided to foster the association of this court with the Paramount Chief, and thus making it difficult for the people to realize that the Paramount Chief's Court was by law only "administrative" and no longer possessed any "judicial" power, also that there was now a president in charge of the Central Court charged with the latter. A statement (comment) overheard from one of the two people attending the proceedings during the field research; suggests that the Central Court at Matsieng has still not lost this image - its association with the chieftaincy. The comment went as follows:

I will end up at Matsieng to Masupha
"ke tla be ke eo kena le eena Matsieng ho
Masupha"

The translated version of this Statement as given above does not portray the precise meaning. However, what the comment implied is that the case was going to be carried on up to the Central Court at Matsieng on appeal. But then it went on to connect that Court with Masupha, who is the present Chief of Matsieng and not the president of the court in question. As demonstrated in Hamnett (1975) in the past, the Paramount Chief himself and his advisers could not

appreciate the change either. The examples from Hamnett (1975) as shown later³⁴ serve to illustrate that on the whole the people and the chiefs could not recognise the effects of separation of powers of authorities into "administrative" and the "judicial" functions, and that the Paramount chief had in the circumstances lost power over judicial matters. So that in practice things continued to operate as they had prior to the 1938 Proclamations, with the Paramountcy engaging in both roles. This factor is important as it influences the manner in which the present customary courts function, especially in the sense that, they are largely viewed as an extension, or rather, a higher level of the judicial structure above the "unofficial" chiefs' courts. Thus not as a system that was meant to replace the old chiefs' courts.

The 1938 Native Courts Proclamation has been amended on several occasions over the years, but is still substantially in force under a different title of Central and Local Courts Proclamation which now regulates the recognition, constitution, powers and the jurisdiction of the courts of warrant. Similarly the Native Courts Rules have undergone various amendments, but the main principles remain the same as those described in the preceding sections. The original tripatriade structure³⁵ has been maintained over the years, with only a change of title in respect of the lower courts from the Native Courts to Basuto Courts³⁶ at one time, and now to the Central and Local Courts. The Judicial Commissioners' Court now forms the apex of the customary courts, instead of

Paramount Chief's Appeal Court or the courts of the District Commissioners.

Thus the subsequent amendments have left the structure, recognition and jurisdiction of the customary courts basically the same as when they were first introduced. Hence, for example, Maema (1985) has argued that the basic legal system of Lesotho may be fairly described as a colonial inheritance.³⁷ Mokoma (1984/85) on the other hand, takes the argument to an earlier period, observing that, the criminal justice system which was established by the Cape Government in Lesotho in 1868 on the recommendation of Emile Rolland, is still prevalent to date. An argument along similar lines with that of Maema (1985) is raised by Poulter (1979) who points out that the prevailing criminal justice system is rudimentary and does not differ much from what it was during the colonial rule. The attainment of independence has not brought major changes to the judicial system first introduced during colonial rule.

The implementation of the new system as Hamnett (1975) argues was as rapid as the authorities chose to make it, and this corresponded to the outline of changes in the courts structure, powers and functions as described above. He further explains that when further changes were introduced in subsequent years, it became the duty of the Judicial Commissioner to try and conscript them into reality. As he further notes, the legal interest of the 25 or 30 years following the intentions of the 1938 Proclamations, lies in the evidence revealing the continuing impetus; within the

new and supposedly "judicial" courts, of forces whose roots lie deep in the old system. Although programmes of re-education were set up and training courses for court presidents eventually instituted, they have not done much to change the attitudes within the Customary Courts even half a century after the establishment of these Courts.

Some of the most illuminating evidence of the persistence of the "chiefly" practice within the courts, as Hamnett (1975) observes, was found in the Court of the Paramount Chief.³⁸ He points out that for a long time after 1938, it remained the practice for the Paramount Chief to "confirm" the decisions of the judicial court at Matsieng, and although this was intended by legislators to be a mere formality, and tolerated by government as a gesture of respect to the Royal Office, it was not so regarded by her or (frequently) by her advisers. Hamnett (1975) says that as late as 1945, the chieftainess' judicial court stated in no uncertain terms that: the Paramount Chief has the authority to cancel or confirm or alter any judgement as she saw proper. It is also reported that she would also confirm a judgement and then, some years later, reverse the decision administratively. Although there was some institutional separation, in terms of personnel between her "judicial" and her "administrative" courts, the chieftainess herself believed that she equally superceded them both.

Hamnett (1975) gives further examples showing that the line of demarcation between the "judicial" and "administrative" duties could not be clearly visualised.

For instance, he says that other chiefs and courts shared the same view with that of the Paramount Chief's Court. He cites one major chief - the head of the Molapo Cardinal house who once recalled the days when chiefs had powers even to alter judgements freely. In addition, he reports how in 1952, a Basotho Court declared that, the chieftainship had no limits on orders it could give. In yet another case, Hamnett (1975) reports that the Paramount Chief's Court is said to have stopped a hearing, declaring that the case could not proceed because it caused the chief displeasure.

While some of the examples quoted above represent some departure from the judicial ideal, and while it could be argued that some of them are abuses or contrary to natural justice and unacceptable in judicial terms, they are quite appropriate to the traditional position of the chief. But even more, they reveal problems that emerged in the course of the implementation of the new system. The examples reveal that the period of transition from the indigenous to the new judicial system was not as smooth as it may be thought, the main problem still being failure on the part of many people to recognise what the separation of "judicial" from "administrative" functions actually meant.

The next sections focus on examining the organisation of these courts and their functioning within the overall structure. The intention is to make a description of how these courts presently operate; as acquired mainly from the observations of ongoing courtroom proceedings and also from the interviews held with various categories of informants,

about the features and the nature of proceedings in the customary courts today.

The Central and Local Courts, unlike the "unofficial" chiefs' courts are statutory, and this has given rise to changes in their basic nature and features as institutions administering customary law; one of which is their complete independence from the chieftainship. They are staffed by different personnel and, in addition, as Perry (1977) notes, the procedure in these courts no longer reflects the traditional, community-oriented based consensus and debate, that characterise the indigenous courts. This last point is elaborated upon further on.

THE CUSTOMARY COURTS AT PRESENT : ORGANISATION, STRUCTURE AND JURISDICTION.

Like their predecessors³⁹ these courts administer primarily the Sesotho law and custom, but as noted earlier on, they also administer a limited number of statutes as may from time to time be determined. According to the Acting Chief Justice, the jurisdiction of these courts is limited to the application of few statutory matters, precisely they are not well equipped to deal with statutory provisions and questions relating to the interpretation of legal statutes. As he explained "a layman like a court president cannot really interpret a statute".⁴⁰ The whole point is that the court presidents have no legal training to do so, nor to know what the process of the interpretation of statutes involves.

The term "customary courts" is in this case used in the context of the primary law administered by these courts. While, in addition, the following descriptions contain a notion that these courts are a creation of colonialism (Twining (1964); Chanock (1978); Snyder (1981); Woodman (1983)), a further definitional problem about them is revealed. This is demonstrated in how in their operation, these courts draw their identity from both the "unofficial" chiefs' courts, and the received law, combining them in a highly complex process of interaction.

The Local courts are first instance courts for all cases save murder, treason, sedition, robbery, assault with intent to do grievous bodily harm, rape, and housebreaking with intent to commit a crime. They are also denied power to handle certain civil matters such as those relating to marriage contracted under civil rites except where it concerns the payment or return of the "bohali" bridewealth. It is worth noting, however, that cases of marriages dissolved in the High Court, are rarely taken to the customary courts to claim the "bohali", bridewealth. Again this could be associated with the people's lack of knowledge that the dissolution of marriage and the claim of "bohali" ought to be undertaken in different proceedings, where the marriage was contracted according to civil rights. The Central Courts come immediately above the Local Courts, and while they primarily hear appeals from the latter, they are also empowered to hear cases as a matter of first instance. The Judicial Commissioners' Court as already mentioned, forms

the apex of the customary courts' structure and acts as an appellate court for cases from the lower courts. From there, appeals lie to the High Court. Every effort is provided for in the customary courts to counter delay, and in cases of unreasonable delay the concerned parties may apply to a higher court which may direct that a speedy hearing of the case concerned be made. This was the case in CO/9/JCCQ/JCS/4.6.87 in which the Judicial Commissioner noted that there had been several interjections by the magistrate.⁴¹

Similar intention could be inferred from the advice of the magistrate in CO/8/JCQ/JCCS/4.5.87⁴² Also where there are sufficient grounds that injustice may occur, the advising court may hear the matter itself, or make any such recommendation as it sees fit.

THE JUDICIAL COMMISSIONERS' COURT

This level of the customary courts was first established in terms of Proclamation No.16 of 1944, and later it came to be governed by Proclamation No.25 of 1950. This Court replaced the District Commissioners' Courts, which were also preceded by the Paramount Chief's Appeal Court.

The original jurisdiction of the Judicial Commissioners' Court has been upgraded from that of the First Class Magistrates⁴³ to that of the Resident Subordinate (Magistrate) Courts.⁴⁴ However, still no civil suit or action or other civil proceedings can be commenced in the Judicial Commissioners' Court. As the Director of Public Prosecutions, pointed out, this court is an appellate court

and not a court of original jurisdiction. The decisions of the Court of the Judicial Commissioners, as noted by the Acting Chief Justice are, however, not reviewable by any other magistrate but go straight to the High Court for appeal or for review, if necessary.

The Judicial Commissioners' Court is, in addition, empowered to state a case for consideration by the High Court on a point of law, especially where there is a conflict between the customary law and the received law. The Chief Magistrate in an interview said "unless something like a point of law arises", the Judicial Commissioners' Court can be taken as the ultimate authority under the customary courts hierarchy. As the Judicial Commissioners indicated, most cases in which points of law as described above arise, are those in which legal practitioners appear representing the parties. The interesting question is why such points seldom arise in cases where there is no legal representation. The argument which will be advanced later is that, as observed from the proceedings of this court, in the absence of lawyers, the tendency is to strike a balance between customary law principles and the received law. This is one reason why it is argued in this thesis that the customary courts in practice represent a compromise between the "unofficial" and the official received law procedures so that in practice the two seldom conflict as often portrayed in the literature.

At present there are two Judicial Commissioners in post. They are itinerant "magistrates" travelling from district to

district although they have a court in Maseru (capital town). This is a situation different from the colonial times, when the Commissioners' courts existed on permanent basis in various districts. Today the people have to travel to the districts' headquarters, when the court of the Judicial Commissioners is on circuit in their respective districts. What this means is that, appeals from the Central Courts in the districts have to wait for a period of approximately a year before they can be attended to. As indicated by the Judicial Commissioners in an interview, their court sits only once a year in each of the districts, with each session lasting for approximately two weeks, and after every session in a given district a report is prepared of cases dealt with, those outstanding, and so on. As further indicated by the Judicial Commissioners, the numbers of cases vary from district to district. In their observation the District of Leribe comes second to Maseru in the rate of appeals coming to court. The main complaint they raised is that there is not enough time to fulfil all the duties required of them, and even report writing becomes extremely difficult within the limits of the time available. The conclusion that can be drawn here is that the work is too much for two Judicial Commissioners.

Because the Judicial Commissioners' Court is empowered to administer primarily the customary law, the Judicial Commissioners are usually people who have both an interest in, and some knowledge and experience of that law (Palmer and Poulter, 1972). This is despite the fact that the rules of

procedure and evidence in this court have changed tremendously, especially because of the right of audience the legal practitioners are given at this level of the customary courts.⁴⁵ Thus the Judicial Commissioners' Court has to apply customary law while making use of procedures and rules of evidence which are not of the same origin. The result of this in practice is that a close relationship has been fostered between the customary and the received procedures as to be demonstrated later, producing a complex system, built on a compromise between the two, in an attempt to cope with the conflicts that arise. This in a way further illustrates the argument that the indigenous principles for the settlement of disputes and the received ones are not operating as totally separate entities. While, tensions occur in practice, as a result of the coexistence of customary law and the received procedures and rules of evidence, again the observations carried out in this court reveal that such tensions are more evident in cases where legal representatives appear, since they are more inclined to apply the received law procedures on which their training is mainly based.

In carrying out their duties, the Judicial Commissioners are assisted by assessors, whom according to Palmer and Poulter (1972), can be of invaluable assistance. This is confirmed by the statement from Thompson (1968), once a Judicial Commissioner in Lesotho, that he had tremendous advantage of sitting with assessors, specially chosen for their knowledge of customary law. He states that the

assessors were well experienced in deciding customary cases, and were seldom at loss on a point of law at issue, and in making decisions. From the interview with the Judicial Commissioners, they expressed that the use of assessors which still prevails, arises purely as a practice from colonial days when the court was presided over by Europeans. At that time, as they pointed out, the assessors were helpful in determining and advising the Judicial Commissioners with regard to Sesotho law and custom, but today the practice is obsolete. One Judicial Commissioner commented:

When I have an assessor, as a Mosotho, what advice regarding custom can he give me which I am not familiar with? The magistrates are there, and they sit alone, without being assisted by assessors (Sennane: 7.5.1987).

From courtroom observations ~~carried out~~ carried out in this court, I discovered that the assessor is in fact seldom asked to give his opinion or ask questions. Perhaps the reasons for this are evident from the statement of Judicial Commissioner Sennane as cited above. Looked at in another way, the use of assessors in the Judicial Commissioners' Court, could be interpreted as a way of legitimizing this court to the people, by maintaining the indigenous element of having advisers as practised in the "unofficial" chiefs' courts. But it could also be aimed at reducing the conflict that could otherwise arise; in the event when the presiding officers lack the knowledge of the customary law principles. In addition to assessors, the Judicial Commissioners have court clerks who accompany them on their sessions in the

districts as they are ordinarily stationed in Maseru.

The bulk of the work of the Court of the Judicial Commissioners consists of hearing civil appeals from the Central Courts, a factor which becomes obvious from the statistics of the proceedings of cases observed during the field research as summarised below. This was further confirmed in an interview with the Judicial commissioners, in which they pointed out that, first, they hear appeals from the Central Courts as no appeal can come to them directly from the Local Courts. Secondly, that most of the cases they attend to, relate to civil disputes on land "masimo" (fields) and "lijarete" (gardens). The observations carried out in this ^{court} revealed that other appeals involve civil disputes over reserved pastures, stray stock, and trespass by animals on fields. Other causes for appeal pertain to dissatisfaction with the manner in which cases have been handled by the lower courts (e.g. unfair charges), as well as unfair "compensation" orders and other judgements. The Judicial Commissioners admitted that sometimes they hear criminal appeals such as those involving common assault, however, these are extremely rare.

In Quthing while the Judicial Commissioners Court was on circuit there, a total of 34 proceedings of cases on appeals were observed. All of the observed proceedings concerned civil appeals of the type of matters described above. They ranged from disputes on land to claim of "bohali" bridewealth (1 case); and claims for compensation. In all of these, legal practitioners appeared in 13 cases, among which both

parties were represented in only 4. In 6 cases in which the parties ought to have been represented, the legal counsels were not in court - they made no appearance. In 17 cases, there was no legal representation, thus the parties were appearing on their own behalf or represented by a non-legal representative; such as a relative. All cases were completed and judgement was ~~deferred~~ in only 1 case. 2 cases were remitted to the Central Court and 3 to the Local Courts; on grounds of failure to abide by procedure as shall be discussed later.⁴⁶

Another important factor is that the proceedings before the Judicial Commissioners' Court do not take the form of a complete hearing, instead the court relies on the records handed over from the lower courts. There are a number of problems that emerge as a result of this procedure, mainly because of incomplete record-keeping prevalent in the Local and Central Courts, as this task is in the hands of clerks who are not properly trained and prepared for the job. Other problems are discussed under the sub-heading of "Procedure and Evidence in the Customary Courts", showing how some cases often have to be remitted to the lower courts for fresh hearing as a result of inaccuracies in procedure. This applies to 5,⁴⁷ of the cases as given in the statistics of cases observed in the Judicial Commissioner's Court, 2 of which were sent back to the Central Court and 3 to the Local Courts.

THE CENTRAL AND LOCAL COURTS.

The Central and Local Courts⁴⁸ are the officially recognised Customary law institutions possessing judicial powers, as against the chief courts which are not officially recognised as such. Because of their close association with the Basutoland National Treasury,⁴⁹ these courts became popularly known as the "treasury courts", a title still employed by some people even today. Sometimes the label "Basotho (Central and Local) Courts"⁵⁰ is also employed.

The extent of these Courts' jurisdiction and powers are spelt out in their respective warrants, with certain categories of cases especially on the criminal side, removed from their powers.⁵¹ Questions relating to the jurisdiction of the cases these courts are entitled to deal with, seldom become an issue in the proceedings and so are matters relating to their geographical jurisdiction. However, the possibility of such issues being raised, ^{cannot} be totally ruled out especially where legal representatives are involved.⁵²

For example, one day before the commencement of proceedings in the Roving Stock-theft Central Court,⁵³ I was having discussions with one defense counsel who was to appear in one of the cases, and he mentioned to me that, he was going to raise a point about the territorial jurisdiction of the Court as a defence. According to his argument the concerned matter ought to be heard in the Teyateyaneng district, and not in Maseru. He claimed that the summons showed his client as belonging to Maseru, which he said was

incorrect and claimed to have evidence to prove this. In his explanation the Court could not hear a case out of its two miles jurisdiction. Without going into the details of the arguments of the defence in this particular case, the description does show that issues about the geographical jurisdiction can sometimes be raised. It also shows the importance attached to technical formalities of procedure, which is not present in the "unofficial" chiefs' courts.

The Roving Stock-Theft court referred to above is a Central Court which rotates from district to district. It differs from the courts of its cadre in that it has jurisdiction equivalent to that of the Resident Magistrates' Courts, although its cases are reviewable by the First or Second Class Magistrates, who have less jurisdiction. As the Chief Magistrate explained in an interview, because of this abnormality, this court was once abolished but has since been reactivated. The Chief Magistrate referred to it as a "police Court" because it has its own president who is assisted by the Stock-theft Division Police, but also because, as he stated, the police like it since as a Central Court it is easier to get a conviction there than in a Magistrate's Court, where technical aspects of procedure are highly emphasised. The main issue is that the police have no training in the received law procedures employed in the Magistrates' Courts, hence prefer the Central Courts environment where these are not strictly observed.

The Central and Local Courts Proclamation No. 62 of 1938⁵⁴ is the one that now regulates the recognition,

Constitution, powers and jurisdiction of the courts of warrant. Various amendments have been introduced, for example, the jurisdiction of these courts was enhanced in 1979 and in 1981. In the latter, the Central and Local Courts were given powers to administer the Dog Tax Proclamation No. 36 of 1948. This gives an indication of the type of matters relegated to the Customary Courts generally. They are given powers over matters which are relatively unimportant. No one believes in the taxation of dogs in Lesotho; therefore this extension of the powers remains largely irrelevant and inapplicable. It seems the idea is that these courts cannot be given jurisdiction over the more important and serious matters; both on the civil and the criminal side. However, the practical reality reveals that the customary courts sometimes handle matters considered to be beyond their powers. As noted by the Director of Public Prosecutions in an interview, the issues considered in making decisions about which court a case must be referred to, are themselves still confusing. He pointed that, however, the police decisions for referral to a large extent depend on the injuries caused. He said "if injuries are judged to be quite bad, or if the destruction to property is quite extensive, they [police] usually refer [cases] to the Magistrates Courts. But if they are petty squabbles, they refer them to the Local Courts".

The point made by Acting Chief Justice is that, the Central and Local Courts "are important because they deal with small claims, so that the superior courts are not

burdened with unnecessary things". A similar point was made by Judge Molai, that the Local and Central Courts administer "basically custom and petty statutory offences" examples of which he gave as the use of abusive language ("mahlapa a tala"); and disputes over boundaries of land; disputes over ownership of land; tree plantations; fights between children and sometimes even adults too. However, he recalled how while he was the Chief Magistrate, he came to realise to his surprise that the Local Courts sometimes do handle serious cases which under normal circumstances and by law should be referred to the Magistrates' Courts.

It was the 1938 Native Courts Proclamation [Sec. 9] which initially made provision for these courts to administer, first the general law, which includes any provision as authorised by order of the High Commissioner and also provisions of all rules or orders made by the Paramount Chief, Chief, Sub-Chief or headman under the Native Administration Proclamation No. 61 of 1938. Secondly, they were authorised to administer the Native Law and custom prevailing in the Territory, subject to the "repugnancy clause" as described earlier on. These and some other provisions guiding the Central and Local Courts remain largely the same as stated in the 1938 Proclamation from which they originated, with, however, some minor modifications, in recognition of the titles of officers who received authority at independence, for example. These courts are today recognised under the hand of the responsible Minister, (no longer High Commissioner or Resident

Commissioner) acting in concurrence with the Chief Justice. The customary law that they ought to administer now includes rules or orders made by the King or a chief, sub-chief or headman as provided for under the Chieftainship Act.

As in the previous Proclamations, these courts still have no jurisdiction to try cases in which a person is charged with an offence in consequence of which death is alleged to have occurred, or which is punishable by death or life imprisonment. They also cannot try cases in connection with marriage other than marriage contracted under or in accordance with the customary law, except and in so far as the case concerns payment or return or disposal of "Bohali" (bride-wealth). Thus in more general terms these courts can deal with issues of marriage constituted in accordance with Section 34 of the Laws of Lerotholi.

The civil and criminal jurisdiction of these courts is spelled out in their respective warrants. In broad terms, such jurisdiction is based on the cause of action having arisen in, or the "defendant" being ordinarily resident within the court's area in civil actions; and on the offence having been committed therein in the case of criminal proceedings. The warrants also contain certain financial limits for jurisdiction in civil proceedings, and the maximum punishment that may be imposed by each court in sentencing in respect of criminal offences. In addition, there is provision for any person aggrieved by an order or decision of a lower court to appeal to a Central Court, provided that this is done within 30 days from the date of such order or

decision.

Furthermore, the customary courts have powers to imprison offenders, unlike the old chiefs' courts which were limited to "fines", public ridicule and occasional banishment. Another difference is that fines are now paid in cash, and these go to the state and no longer to the chiefs.

It is also provided that the customary courts may inflict any punishment authorised under customary law, for as long as it is not repugnant to natural justice and humanity.⁵⁵ The courts have to observe that punishment must in no case be excessive but they should ensure that it is always proportional to the nature and circumstances of the offender.

All these principles bring these courts closer to the rules guiding proceedings and sentencing in the received law courts. Where the punishment to be inflicted proves greater than the court has powers to inflict, it may commit the offender in custody pending sentence by a higher court. However, the point made by Resident Magistrate Mohale is that, whenever a Central or Local Court sentences a man to a term of imprisonment, the committal warrant has to be signed by a magistrate who may invoke his revisionary powers.⁵⁶

The overlap between civil and criminal sanctions which existed in the indigenous system has to some extent been maintained. The rules permit a customary court to direct that any fine or part of it; be paid to the person injured or aggrieved by the act or omission, in respect of which the fine is being imposed. If such agreement is accepted, a person cannot thereafter bring any civil proceedings in the

received law courts to recover damages in respect of the same loss or injury.

It would not be possible to give an overview of all the changes brought by the introduction^{of} the customary courts in one work, but the foregoing descriptions do provide sufficient evidence showing the major differences between these courts and the "unofficial" judicial mechanisms as discussed in the previous chapter. So far, the descriptions have focused mainly on the theoretical aspects of the customary courts, as against what happens in practice. The latter is dealt with in the next section. However, before doing so, it would be of interest to go over some of the issues raised by the informants during the interviews regarding the customary courts; as they tend to have a bearing on the practices in these courts.

Several points were raised by various informants about the organisation, structure and jurisdiction of the courts. The Attorney General, for instance, said that the process of appeal in the customary courts, is too long. From the Local Courts, which are first instance courts, up to the Court of Appeal which is the ultimate court of law, it takes five stages - the Local Court through to the Central, Judicial Commissioners; the High Court; and finally to the Court of Appeal. This is regarded as unsatisfactory especially because on the side of the received law courts, it takes only three stages from the Magistrates' through to the High Court and to the Court of Appeal. The process is even longer in view of the fact that, some of the cases would have been

before the "unofficial" courts prior to reaching the Local Courts.

On territorial jurisdiction of the customary courts the Attorney General pointed out that, the position of these courts is satisfactory in that the people know which court to go to when they have disputes. The Acting Chief Justice on the other hand, raised an important point that the territorial jurisdiction of the Central and Local Courts, unlike that of the "unofficial" Chiefs' courts, is not allocated according to villages but on a regional basis, with the Central Courts covering wider areas of jurisdiction and each having several Local Courts under its responsibility (Appendix B). One advantage of these courts according to him is that they are much widely scattered and better distributed within the country, and thus are more accessible to the people they serve, than the received law courts. Furthermore, he contended that the number of the Central and Local Courts is quite satisfactory, but recommended that, the jurisdiction of the Local Courts territorially be increased, and then the Central Courts be abolished to shorten the line of appeal, which as expressed by the Attorney General, is too long at present.

Another point raised by the Attorney General concerned the jurisdiction of these courts in terms of the nature of disputes they are entitled to handle. His opinion is that the problem is not so much with the numbers of courts, but with the allocation of jurisdiction between the received law courts and the customary courts, in terms of matters that each

system of courts can deal with under the law. He implicitly suggested that the jurisdiction of the customary courts could be increased; to reduce case-loads for the received law courts. At the same time, as noted earlier, there is still a view that these courts are not well equipped to deal with matters of a serious nature and with numerous cases arising out of statute law.

Further points, concerning the jurisdiction of the customary courts in terms of the nature of dispute, were raised by Judge Molai. These relate to the fact that the decisions of the Local and Central Courts are reviewable by the Magistrates. He first pointed at the prevailing uncertainty about what matters should be referred to the Local Courts, and which ones fall directly under the jurisdiction of the magistrates. The uncertainty is more reflected in the practices of those who make the referrals - the chiefs and the police. As Judge Molai pointed out, it is still pretty unclear as to what factors influence the referrals of cases to the courts. He stated:

The Chiefs themselves are not certain about these things. You may find a case which you may regard serious enough to need referral to a Magistrate court, referred to a Local Court (Molai: 3.3.1987).

Some of these abnormalities occur because there is only one Magistrate Court in each district but several Local Courts, and the former may be very far from the Local Court and from the people. So instead of travelling long distances to a magistrate's court or police station, a chief would be more

inclined to take the matter to a nearby Local Court, thus if he does not hear it himself. Although the Local Court president can hear the case in question, he may at the end of the day find that it is beyond his jurisdiction. If the Local Court does not hear the matter, the people are then subjected to travelling long distances, to find a police station or a Magistrate Court. These circumstances lead to situations whereby cases which ought to be brought to Magistrates Courts ending up in the Local Courts.

Judge Molai, in addition, pointed out that some of the serious cases are referred to the Local Courts by the police themselves. He gave an example of what happens in the township of Maseru in which a special Local Court has been established purely for the convenience of the people living in the area, in which he expressed:

For instance, we have got a Local Court here in Maseru, next to the Charge Office [police station]. You go there, you may find that cases which you would not regard to be all that minor are taken to that court. (Molai: 3.3.1987).

As he added, in the township of Maseru, when an offence is committed it is most invariably reported to the police and not to the reserve headman (chief); and then the police make appropriate referrals. As he further explained, the police just like the chiefs, cannot differentiate between serious cases which should be properly referred to the Magistrates' and not to the Local Courts. Even when the referrals have been made the Local Courts sometimes redirect some cases to the "unofficial" courts.⁵⁷ This is described further on, as

one of the illustrations of continuity between the "unofficial" court structure and the "official" judicial system. But also this shows that the customary courts rarely address themselves to technical aspects of jurisdiction; as it emerges in the descriptions in the above paragraph.

Judge Molai went on to demonstrate the problems that arise when such inappropriately referred cases,⁵⁸ come for review in terms of Section 26 as cited earlier. As he put it:

The only problem is that as a magistrate, you've got to review some of these cases under certain circumstances and when you review them you feel that, No! this person was given too light a sentence for an offence like this (Molai: 3.3.1987).

In these circumstances, the magistrate has a right to revise the decision of the Local Courts. But as Judge Molai indicated, in practice; it is only when one feels strongly that questions of jurisdiction have been extremely overlooked, that he would order the proceedings of the Local Courts to be quashed, and then refer the matter to an appropriate court. However, this is not often done, because as Judge Molai explained if it were to happen frequently, "it may not be nice to one of the litigants; he has been through the mill and his case has been heard by a court of law and disposed of. Now you are making an order that it should start all over again. So it is not a thing a magistrate will do very lightly. You do it in exceptional cases where you feel that this was too serious an offence, and it should

have been brought before a magistrate. But [in] 99 per cent we let them pass, simply because a man has already been through court process and he thought his case was over. It would not be fair on review, to come up with a decision that this thing should start all over again". The review powers which the Magistrates possess, and their powers to revise decisions of the Local and Central Courts, reaffirms the superiority of the Magistrates Courts.

The above descriptions provide evidence of issues that arise in the day-to-day operation of the customary courts. Others are discussed later. One would have assumed that by now questions such as those pertaining to jurisdiction would have become matters of simple routine easily observed. Yet even 50 years after the introduction of these courts, they are still not easy to abide by, in all instances. It is against the background of the descriptions made so far, that other practices in the customary courts must be understood.

PROCEDURE, EVIDENCE, AND PRACTICE IN THE CUSTOMARY COURTS

The emergence of the customary courts, with their different organisational structure and jurisdiction, was accompanied by transformations in the rules of procedure and evidence for conduct of proceedings. Unlike in the "unofficial" courts, practice and procedure, as well as rules of evidence in the customary courts, are generally, inclined towards the adversarial approach. This becomes particularly prominent when looking at the operations of the Judicial Commissioners' Court and the Roving Stock-Theft Central

Court, in which legal practitioners appear much more frequently than in the Central and Local Courts, thus changing the outlook of the proceedings in those courts.⁵⁹

In addition to describing the rules of procedure and evidence, this section explores how far and to what extent the new rules of adversarial procedure have taken root in the practice of the customary courts at present. The Central and Local Courts, as revealed by the data used^{are} still much removed from the adversarial rules of trial for reasons explained further on.

The shift towards the adversarial procedures and rules of evidence in Lesotho is explained well by McClain (1985) in which he recognises the substantial contribution the English law has made to the South African criminal law. The latter was generally transferred into Lesotho by the 1884 General Law Proclamation which dictated that "the law for the time being in force in the Colony of the Cape of Good Hope", shall also be the law of Lesotho. Since then this provision has continued to apply; also making the English procedure of trial a permanent feature of judicial proceedings in Lesotho. While in addition, there is provision for customary law to continue being applied to "Africans" (generally understood to refer to the Basotho people), it was mentioned earlier that in the event of conflict, the legal principles and rules of the received law must prevail.

The purpose is not so much to spell out all the principles of either the civil or criminal law procedure and evidence, but to make broad descriptions about their nature,

and also to examine how they have been implemented over the years. An attempt is also made to say how much the functioning of the official customary judicial structure is different from that of the "unofficial" courts, at the same time determining whether it bears any resemblance to that in the received law courts. The observations and interviews carried out during the field research covered both aspects of the civil and criminal procedure and evidence. So the use of examples of civil cases in the descriptions that follow arises simply from the fact that, with the exception of the Roving Stock-theft Central Court, the bulk of these courts' work consists of civil disputes. For instance, civil claims arising out of matters dealt with as crimes by the received law courts such as homicide or rape, are referred to the customary courts for settlement. In addition, the courts deal with a variety of other civil disputes, examples of which were given earlier on in the chapter. In the main, the issue is that the criminal jurisdiction of these courts is limited to very few matters as pointed out earlier. Generally speaking, the observations revealed that, there is a high tendency to institute civil proceedings claiming compensation either for injuries suffered or damage to property, even in cases where there is a possibility of a criminal case. There is one possibility though, that the matters observed, had already been before the received law courts for criminal proceedings; in the manner explained above.

The Central and Local Courts (Practice and Procedure)

Rules⁶⁰ which now govern the proceedings in these courts have their roots in the former Native Courts Rules of 1946 and the Basuto Courts Rules of 1961. The Rules provide that practice and procedure in the customary courts shall be regulated first, in accordance with Sesotho custom and law, and secondly, in accordance with the provisions of the Rules.⁶¹ But as mentioned once before, where conflict arises between the two, the latter must prevail. The main point is that these courts are statutory, and while they are empowered to administer the customary law, they are not as traditional nor are they as customary in the sense used in the context of the "unofficial" courts. This is confirmed by the fact that they are not exclusively governed by customary procedures and rules of evidence. The Rules set for the guidance of these courts, provide for a movement away from purely customary ways and procedures of dispute settlement, to a more legalistic approach, a trend which was initiated during the colonial times. As Judge Molai stated, questions of administering customary law have now been complicated by the advent of the received law and statutes. So that while "unofficially" recognised courts and the official court structure are sufficiently different at the theoretical level, at certain times, they share certain characteristics manifested more profoundly in the practice of the customary courts. Hence while in describing the theoretical characteristic of these courts and their coexistence with the "unofficial" chiefs courts, an element of conflict between the two surfaces, in practice the customary courts system is

a synthesis of various systems, most apparent in considering the rules of procedure and evidence they employ.

Furthermore, as provided for and facilitated by the Rules, there has been a standardization of procedure and practice in the customary courts, to a certain extent assimilating their procedure and rules of evidence with those of the received law courts. It is in this light, that Maope (1986) recognised the former as statutory courts of a special kind - applying customary law, but through procedures arising not purely from custom; while at the same time they are not exclusively regulated by statute either.

The application of the adversarial principles of procedure and evidence in these courts at the practical level, must be understood within the context of the relationship they have with the "unofficial" courts, and also in the light of the characteristics alluded to distinguish the two from each other. The first one is that the personnel in the customary courts no longer necessarily consists of chiefs. This is of course as a consequence of the attempt to draw a dichotomy between the "judicial" and "administrative" duties, which was traditionally both institutionally and conceptually absent. As already mentioned, each of the Local and Central Courts now has a president, and also a court clerk. The latter takes care of all the clerical routines of the court, but also acts as a prosecutor in criminal cases, although he does not advise the president either on points of law or procedure. The clerks also undertake other odd functions here and there as they may

be requested. For instance following the proceedings of the Roving Stock-theft Central Court; the prosecutor asked the Court Clerk to step-in for him until the president announced the next date of the hearing for Case RSTCC/3/M/30.4.87.

The former had to attend to another case at the Magistrates' Courts. In the Judicial Commissioners' Court, the clerks also act as interpreters in cases where legal practitioners appear, as they often tend to conduct proceedings in English.

The difficulties associated with the use of court clerks as interpreters are dealt with in later.⁶² It is in the light of similar observations that Perry (1977) comments that the court personnel no longer reflects the stable relations of the Village, as the presidents and their clerks are normally outsiders to the villages in which they work.

The difference of these courts from the "unofficial" courts is further confirmed by the existence of a court messenger who, in addition to his ordinary duties, maintains the decorum of the court; which is adhered to with great variance at this level of the judicial process. The observations from case RSTCC/3/M/30.4.87 can be used as an example here. One case had just been completed, and the prosecutor was talking to a group of people who were entering the court; trying to establish which ones were witnesses in the case above. He indicated that one small boy's name did not appear on the list of witnesses, but went on to check the papers. One of these people indicated that they had all received summons, including the boy. The court clerk at that point came into court, and was asked by the prosecutor

whether this case was on the roll of that day. The clerk could not find the papers for the case. At this point I was wondering whether the proceedings were in progress. A decision was made that the matter be postponed, and the president announced the next date of the hearing as the 1.7.1987. The court had never been called to order following the discussions of the prosecutor with the witnesses, and later on with the clerk. The president then stood to leave the court without adjourning the proceedings. In any case, I thought the issue about postponement was over, when I heard the prosecutor saying to the president "I was saying that, since the papers for this case are not there, the proceedings be postponed," to which the president just responded "I'm coming right now". By this time I was standing in amazement at what was happening. The president emerged, everyone was told to stand up, thus calling the court to order. Having announced the next date of the hearing for the second time; on this occasion the court was accordingly dismissed.

In addition to issues of the decorum of court, the above observations reveal the unpreparedness with which proceedings in these courts are handled. The papers for the case were not available, yet the people concerned in the matter had been summoned to come to court. Even the boy whose name the prosecutor could not find on the list of witnesses, as one of these people revealed; had received a summons. Such occurrences are not rare at all in the Central and Local Courts, despite the rule that cases should

be properly scheduled.

The fact that the personnel in the customary courts no longer come from the villages in which they work,⁶³ does not, however, seem to make them ignore all aspects of dispute settlement relevant in the village context as reflected in practice. The contention of the Attorney General is that, while the presidents and other personnel may not come from the villages in which they are stationed, they know about village life, and, therefore, still give considerable regard to various aspects important to the villagers, such as, for example, the status relationships of the father to a son. He noted that family status relationships are viewed as an important element in dispute settlement processes, in the Judicial Commissioners' Court as well. This indicates of how these courts still fall back onto traditional practices. It also represents an element of continuity with the traditional system whereby customary values become influential in proceedings which are otherwise expressly regarded as official; and different in approach from those in the "unofficial" courts. As a further proof that the status relationship between the father and the son are still upheld, in CO/MSLC/4/28.4.87, the court clerk said to a witness "don't look your father in the eyes like that you". This was a case involving payment of "Bohali" bride-wealth, and the son was here being cross-examined by his father.

Because the prosecutor-clerk of court does not advise on points of law and procedure, but also because of the influence of adversarial principles, the president reaches

his decision on the basis of his knowledge and experience. The same position obtains in the Judicial Commissioners' Court where the decision of the court is not influenced by the assessor or any other adviser. This contrasts with what happens in the "unofficial" chiefs' courts in which the decision is made jointly by the chief and his men of the court.

The personnel in the Central and Local Courts, however, are not trained legal professionals, and therefore lack knowledge of the received law. As a result, they do not stick by the procedures as written down. For example, as stated by the Chief Magistrate, the presidents are people who have been clerks in the same courts, and have now been promoted on the basis of their experience and exposure to court practice. A similar observation was made by the Attorney General, who added that under the circumstances, the presidents cannot be expected to have a full grasp of rules of procedure and evidence, nor to have a full understanding of what they mean and how they ought to be applied. So that "if mistakes are being made, they will continue indefinitely, as the system has devised its own internal mechanism of producing its personnel."⁶⁴ Similarly the point about the educational standard of court presidents was raised by Acting Chief Justice. He said that the Local Courts presidents do not like the new procedures because of their low education, but rather prefer and "are happy" with the simple procedures. In his words:

So if you introduce something a little complicated they do not even understand

it. This is why we are careful that all statutory offences - most of them at least - should not go to those courts, but should come to the Subordinate [Magistrates] Courts. It is only the Land Act which provides for cases to be taken to a Local Court, most statutes don't (Kheola: 16.2.1987).

The above, clearly demonstrate that there is full awareness that the customary courts do not work according to the rules set for them. This is explained and justified in terms of factors such as the low educational standards of the personnel in them, but also, from the statement of the Acting Chief Justice, there is conscious effort to prohibit statutes making provisions for the customary courts to handle things that fall out of their understanding and their capabilities.

According to the Chief Magistrate even the Judicial Commissioners cannot be held as trained in the received law and its principles. They have only been trained in what he termed "Local Law", which he described as a kind of in-service or on-the-job training. As he further noted with regard to the clerks of court, most of them are very young women, whom he said "without prejudice, in their upbringing do not take much notice of custom", yet suddenly they find themselves confronted with situations in which they have to meet complex customs and thus have to learn on the job, under the guidance of other personnel who often also have little understanding of how things ought to be done; in accordance with the new procedures. The customary courts personnel, as he pointed out, are offered no training in the customary law and its procedures either. He expressed that the occasional

training courses run by the Training Officer from the Ministry of Justice, are simply inadequate to redeem these courts from the manner in which they presently operate. He said that "they are literally crawling in the darkness". In considering the application of accusatorial rules by the customary courts in the context of Lesotho, therefore, caution must be exercised, as in practice many of the rules are modified to suit the circumstances of the courts presided by "judges" not professionally trained in law, but also the suit the economic and social circumstances of the populations served who are neither familiar with these new rules.

As the Attorney General stated, in theoretical terms, (as against what really happens in practice) the rules of evidence and procedure in the customary courts are similar to those applied in the received law courts, the differences being only of detail. This is particularly so in criminal proceedings. The Acting Chief Justice reaffirmed this by stating that customary procedures are no longer in use. The trial in a Local Court, he said, has to be presented in a proper way as in any other court.⁶⁵ For example, he indicated that hearsay evidence is unacceptable even in these courts. At the same time it is important to take into consideration the point made by the Judicial Commissioners, that the customary courts, unlike the received law courts are not so bound to work on strict technicalities of the legal rules. This statement of the Judicial Commissioners, is important because it tends to explain a lot about the practice in the customary courts, whereby rules as such are

still not taken very seriously, as the observations conducted in these courts revealed.

For example, the Judicial Commissioner in CO/4/JCCQ/JCS/3.6.87 noted his recognition that procedure had not been followed in the first instance court, - a witness was allowed to give evidence after both sides had closed their cases. But then he went on to state that, however, even the High Court has recognised that such "things" (mistakes) do happen in the lower courts. He said this is understandable in view of educational standard of the personnel manning these courts, the result of which is that the accusatorial procedures are not exclusively enforced. In agreement, the Attorney General stated that the customary courts, do not pin people down to the technical points of procedure but rather, place emphasis on the facts of a case.

The point admitted here is that these courts have ceased to be regulated exclusively by traditional rules. At the same time, the new rules of procedure are not strictly adhered to, because of recognizable constraints. While Palmer and Poulter (1972) indicate the movement towards more modern practices (that is, towards the received law practices) has been generally welcome over the years; on close examination of the manner in which these courts operate there exist certain conditions which prevent the full application of the accusatorial principles at this level of the judicial hierarchy. These circumstances include the level of training of the personnel, and the lack of understanding and knowledge about the adversarial procedures

among the Basotho people generally. It is on the basis of facts revealed by the information gathered through interviews and observations that the thesis argues that in practice the customary courts represent a compromise between the procedures and rules of evidence of the "unofficial" mechanisms of dispute settlement and those of the received system as the following descriptions indicate.

While in certain instances it is evident that the new rules have become influential, in practice, even in the Judicial Commissioners' Court; no convictions or any other judgements are ever set aside purely on the basis of technical defects or omissions of the rules of procedure or evidence. This is exemplified in CO/4/JCCQ/JCS/3.6.87.23.⁶⁶ However, undue regard to technicalities is generally not encouraged. The court has to satisfy itself, irrespective of such defects or omissions, that the party concerned is wrongly convicted. In cases whereby conviction or judgement is set aside, it has to be considered whether a new trial should be ordered. In some instances, particularly where legal practitioners are involved in the proceedings, rules of procedure and evidence are strictly applied.

The following example serves to illustrate how in other respects, the new rules have gained a greater strength. In CO/6/JCCQ/JCS/3.6.87, there was an intervention by the Judicial Commissioner directing that "justice must be seen to be done". The assessor was requested to recuse himself, because one of the decisions relating to the matter, had been made while he was president of the Central Court concerned -

the dispute dated back to 1980. Thus because of his prior knowledge and involvement in the matter he could not be allowed to partake in the current proceedings, otherwise justice would not be seen to have been done. This contrasts sharply with the position in the "unofficial" courts whereby people become involved in the proceedings of a court, precisely because they possess prior knowledge about the dispute, and it is such knowledge which they can bring forth as part of the attempt to arrive at a just solution.

In other areas, however, procedure reflects that used in the "unofficial" courts, and is thus very different from that prevailing in the received law courts. Right through the system of the customary courts one finds this blending of procedure and rules of evidence which are of different origins; producing a process which is neither traditional nor purely based on the received law rules. So that the whole system can be described as a new legal system in the making. The next descriptions provide examples which confirm this allegation further. A good example demonstrating that in practice, these courts still incorporate a lot from the procedure of the "unofficial" courts pertains to swearing or taking an oath; which is still not a practice in the customary courts as in the "unofficial" courts. As indicated by Judge Molai:

In the Local Courts, people are not sworn, they are simply warned to tell the truth, which I have always said is simpler than what we do here, in this [High] Court (Molai: 3.3.1987).

This was further confirmed in an interview with the Judicial

Commissioners who stated that, in the customary courts people are simply admonished to speak the truth, and do not take an oath as is done in the received law courts. Regardless of his statement as quoted above, Judge Molai added that procedure may not be as simple as often stated. He said that for instance, in the Local Courts procedure is more sophisticated than in the "unofficial" courts. As he put it:

The accused must stand in a certain box you call a dock, and it is one fool at a time. It is not simply anybody who can stand up at any time (Molai: 3.3.1987).

The Judicial Commissioners urged that procedure in these courts should be kept simple, so that it remains commensurate with the people's understanding. In practical terms this seems to imply, the application or use of more customary procedures as against the more sophisticated and complex ones brought by the advent of the received law.

At this juncture it is important to reflect upon the provision that the customary courts are to follow customary rules of procedure and evidence, except where some other rules are laid down. The fact is that, as pointed out by Maope (1986), the rules meant for the guidance of these courts are laid down by statute, and they appear to be "ordinary simplified accusatory rules" and not customary law procedures. In the interview with him, however, the Attorney General, pointed out the practical reality to be reckoned with is that the focus of procedure in the Central and Local Courts is on the facts of individual cases, rather

than on technical issues of the law and procedure. He stated how because of this simplicity of procedure, many business concerns in Maseru, for example, take matters against their debtors to the Special Local Court; and he further pointed out that the process is quick. As he indicated:

One is simply asked whether he does owe the business concerned, and if the answer is in the affirmative, one is simply asked to pay (Maope: 16.2.1987).

As I observed the proceedings of these courts, I realized that even principles of framing a charge do not apply. The parties simply state the issues in dispute in their own words and by themselves, or sometimes through a non-legal representative, such as a relative. As the Attorney General noted; the simplicity of procedure is maintained by the fact that:

You are sued for something you [know] see and you hear [understand]. You are told that you once purchased a dress, yet you have not yet paid. That is all (Maope: 16.2.1987).

The cause for dispute is stated in simple terms, not presented as a sophisticated legal claim, requiring special proof as defined, for example, in the received law of evidence. The Acting Chief Justice made a statement reaffirming the simplicity of procedure in the Local and Central Courts. He stated that the pleadings are simple. A litigant in a case, simply goes to a court and tells the clerk that he should issue summons and indicates that "I'm suing X, he has taken my car or anything " as the cause might

be. As he further explained:

It is as simple as that, and then when they [litigants] come on the day of the trial; they don't have formal pleadings. They just go into the "witness box" and give evidence. (Kheola: 16.2.1987).

In concluding this statement, the Acting Chief Justice mentioned that, in this way it may be said practice in the Local Courts is not the same as that in the superior courts, where, among other things, a case ought to be filed accordingly and appropriate papers have to be drafted through services of a lawyer.

Another interesting example illustrating the appreciation of the simplicity of procedure, came up during the interview with the Attorney General. He began by stating that people who do not know much about court process believe that the "quality of justice, in terms of getting a speedy and satisfying solution, is at the Magistrates' Courts"; yet it is not necessarily so. To demonstrate this he gave an example of a case involving two lawyers - one Motlamelle and another Monaphathi. The two had a dispute over a type-writer. They took the matter to Matsieng Local Court and not to the Magistrates "because they were aware that the process would be fast, and that they would get what they want". The matter was heard and Monaphathi lost the case. Within two weeks, he had taken an appeal before the Matsieng Central Court; but he lost again. As the Attorney General stated:

The process was quick. At the Magistrates' Courts, it would have taken months or even a year. Here the matter was set before the court, and Monaphathi

was served with the summons. The date of the hearing was set and on that day, the matter was heard and completed. Then an appeal was lodged, within a short time it was over. (Maope 16.4.1987).

An explanation offered by Judge Molai, is that, people tend to believe that there is an "association between the standard of education and the quality of justice". They tend to assume that because the personnel in the received law courts are better educated, they offer a better quality of justice.

As he put it:

But everybody is clamouring that the magistrates courts are better, because they believe people who have been to school know better than a person who has never been to school. I agree on a number of issues, but what about custom? Do you need to learn it in school? ... I have studied customary law in school but I don't think I am better off than an ordinary Mosotho in the village. They've got a lot of things they know and those are the better people ... People who go there [customary courts] are Basotho, and they understand what they go there for. (Molai: 4.3.1987).

The Rules guiding these courts furthermore provide that, the statements made by the parties and witnesses should be recorded verbatim during the hearing. Several difficulties emerge in practice from the implementation of this requirement. First, the parties and witnesses often have to be reminded several times, to allow the presidents enough time to finish writing down the evidence. Secondly, purely practical problems are experienced by the presidents themselves in recording the proceedings verbatim, and this often causes delays. In RSTCC/2/M/30.4.87, for example, a lengthy debate ensued between the prosecutor and one of the

witnesses on the one hand, and the president and the defence counsel on the other. The argument was over the number of items (in the form of cattle) the witness had so far stated in his evidence. The former two claimed that 8 items had been counted, while the latter argued that they had recorded only 6. When the witness went over his description of the cattle for the second time, 8 of them were mentioned. The president and the defence counsel this time concurred. This shows how difficult it can sometimes be to take every piece of detail in the evidence down verbatim, but furthermore the length of even an average trial could be doubled.

Together with the provision that statements should be recorded in a narrative form, it is stipulated that statements must be read back to the party or witness concerned, and then signed by him. However, as established from the discussions with the Judicial Commissioners this rule is not strictly adhered to. Some of the courtroom observations carried out during the field research confirmed this. On several occasions during the observations of courtroom proceedings in the Special Local Court in Maseru, and also in the Roving Stock-theft Central Court, I saw witnesses being asked to sign for their statements, although these had not first been read out to them. Perhaps all this, is with the aim of saving on time. But the problems posed by such short-cutting of procedure are brought to light in the proceedings of the Judicial Commissioners' Court, which as already mentioned earlier, base themselves on the case-records from the lower courts. The following examples

come from some of the observed proceedings, in which something wrong was spotted regarding the records brought before the Judicial Commissioners' Court. Some of the defects or omissions in procedure could perhaps be avoided, if the statements of the parties or witnesses could always be read out to them before they signed for them.

In CO/7/JCCQ/JCS/4.6.87, for example, the appellant disputed that the statements which he was being referred to by the Judicial Commissioner were his, although he could not substantiate his claim. As it emerged as the proceedings continued a peculiar situation had occurred, when the case was on appeal before the Central Court. The Judicial Commissioner revealed from the record that the concerned party had not at any point been allowed to speak for himself at the Central Court. Thus he could not have signed for any statement. As the Judicial Commissioner pointed out to the appellant:

You did not give any statement in your own defence, you only asked [your opponent] questions. There is no record that you ever spoke ... You did not say anything; therefore, your case was not heard, you were cheated. Your case was never stated, therefore you were never asked to sign at the Central Court.

The matter was referred back to the Central Court for another hearing, as a result of this inaccuracy in procedure. The appellant did not raise this technical point of procedure in his own defence - his only concern being his dissatisfaction with the judgement - the point was raised by the Judicial Commissioner instead. In addition, it confirms the argument

made earlier that certain omissions regarding set procedure are not overlooked or condoned.

In CO/8/JCCQ/JCS/4.5.87, there was an argument regarding the content of the records. The appellant disputed that he ever admitted to having ploughed a field "tsimo" before the Central Court. He stated:

I said I ploughed a garden "jarete".

The Judicial Commissioner pointed out that, what the appellant was saying was not what was stated in the record. The record said the site in dispute was a field. When questioned, the appellant agreed to having signed for the statement, but said it was not read out to him before he did. In fact he mentioned that he did not know that it ought to have been read to him before he could append his signature. The reality of the whole situation is that, the proceedings are conducted under the laws and rules which most people have never even read before. That is, besides the point that most of them are written in English which most people are not much conversant with.

In Poulter (1976) it is stated that in the Local and Central Courts, the evidence of the parties and their witnesses is recorded verbatim in Sesotho during the proceedings, but that when an appeal is lodged to the Judicial Commissioners' Court, a full transcript of the evidence together with the judgements of the lower courts and the appellant's grounds of appeal, is forwarded to the Judicial Commissioners' Court where it is translated into English. The practice of translating the transcripts into

English for appeal in the Judicial Commissioners' Court has fallen into disuse since these officials are now Basotho conversant in the Sesotho language. In the matter above it was not possible to work out what had actually happened; especially because as the Chief Magistrate confirmed, the records from the lower courts are today still in Sesotho when they come to the Judicial Commissioners' Court; and are only translated into English, if a matter proceeds further to the High Court. Thus the words "jarete" garden and field "tsimo" cannot have possibly been mixed up during the translation process. What is obvious from this case, is that it is possible to lose the whole context of the dispute through bad recording of proceedings about what was actually said. Because of other inaccuracies established in the manner this particular case had been handled by the lower courts, it was ultimately decided that it should go back to the Local Court for fresh proceedings. From the observations of other proceedings, it seemed that language inaccuracies of similar nature recur as problems during the trials. For example, in RSTCC/2/M/30.4.87, there was an argument between the prosecutor and a witness over the concepts "morena" chief, and "ramotse" headman. The former claimed that both refer to the same, to which the witness could not agree. Some of these language problems could be avoided if all statements were read out to the parties or witnesses for verification, before they are requested to sign for them in the lower courts, and this could counter innumerable delays in the administration of justice.

In CO/9/JCCQ/JCS/4.6.87, yet another aspect relating to the keeping of records in the customary courts was revealed.

In this case the respondent revealed that he had submitted further papers as proof of his ownership of the cow in dispute. He mentioned that the papers had been presented to the Central Court and added that the record ("docket") had gone missing at some point. The Judicial Commissioner discovered that the papers were not included in the file before him, but even more than that, the president made no mention of the loss of the record. As he further pointed out, the case appeared to be muddled, the reason being that it was a longstanding matter, dating back to 1983. There had been several interjections by the Magistrate as well. He also noted that "justice would appear not to have been done if the said papers were not included as exhibits". The papers included one letter from the police and another from the chief. Both contained evidence concerning ownership of the cow in dispute. Therefore, the matter was referred back to the Central Court, with an order that the papers mentioned above be accepted, and that a different president should hear the matter.

The cases described above, reflect upon the variety of problems existing in the Local and Central Courts with regard to taking down of evidence and keeping records. Some of these become more evident when the records are scrutinised in the Judicial Commissioners' Court. One prominent reason for the faulty recording is that, the personnel engaged in this work are not properly trained for the kind of task they have

been put in charge of.⁶⁷ They seem not to fully appreciate the importance of proper record-keeping, and the consequences that may result where decisions are based on inaccurate records. The foregoing descriptions further reflect that the proceedings in these courts are completely different processes from the ones in the "unofficial" courts. It further reaffirms what Perry (1977) for instance, argued that the proceedings in the Local Courts are now marked by a greater degree of formality than those in the chiefs' courts as noted earlier. Palmer and Poulter (1972) too, make a similar observation that the procedure that used to obtain in the past has been modernized and is now much closer to that in the other courts, meaning the received law courts.

The above examples further reveal that while it may be thought that procedure in the customary courts is still very simple as mentioned by the Acting Chief Justice, and also by the Attorney General, in practice some attempt is made to abide by the new rules, and that where this does not happen the presiding officer is expected to act accordingly. For example, he can or is expected to refer the matter back to the court where the observance of procedure was overlooked.

Further provision is made in the Rules, that regular hours of hearings should be kept, and that cases should be efficiently scheduled and handled. From the observations carried out it appeared that while cases are to a large extent scheduled, a lot of negotiations take place as to when particular cases should be called, often at the convenience of legal counsels. Thus those who are not legally

represented have the disadvantage that their cases may be heard last. Sometimes also, the documents of scheduled cases would not be ready or left as some other office. An example here would be in RSTCC/3/M/30.4.87 in which the prosecutor could not find the name of one of the witnesses summoned on his list - the name did not appear at all. The same case could not proceed because the clerk of court could not locate the papers for the proceedings. Therefore, the matter was postponed, the witnesses had to return home. From what I understood later on, the witnesses could not leave on the same day as the buses to where they came from had already left; which meant they would have to wait until the following day. The situation became even more complicated and desperate, when one of the clerks of court declared that these people could not receive their allowances immediately, because the court had not collected any funds that day. To this the prosecutor remarked:

Does this mean in this court witnesses receive allowances only when fines have been paid?

Thus not all scheduled cases are handled on the date set for their hearing. This arises out of many different circumstances, such as failure to secure the attendance of witnesses. In the circumstances delays in the administration of justice are encountered.

Another frequent feature appeared to be failure to begin proceedings on time. A good example of this was on 28.4.1987, when I was to observe proceedings in the Roving Stock-theft Court in Maseru. The proceedings ought to have

started at 8.00 in the morning, yet the prosecutor himself did not show up until 9.20, and the president arrived at 9.30.

During the period of awaiting these officials, I was able to record several statements of dissatisfaction. One comment for instance, came from one of the counsels who was to appear in one of the matters. At one point he was talking to one of the court officials, whom I believed to be a clerk asking as to where the president was. The counsel complained:

When it is us [understood to be referring to Counsels] failing to attend, you find that you push our cases through with undue justice.

In response the clerk merely replied "that is not justice". Later on, the same counsel made a further comment, this time speaking to two policemen who were waiting outside the court:

This is not a fair administration of justice. When people are late, that is taken to be contempt of court without taking the reasons for their lateness into account. While it is the court staff who do not observe time, nothing is done.

On 10.8.1987, I had gone to observe the proceedings of Maja Local Court. On arrival at 10.55 the people who had cases to be heard were waiting, but there was no president. In the office were two court clerks who informed me that there would be no proceedings that day and for the whole week, as the president would be engaged at another court. When I walked into the office, a quite elderly-looking woman was talking to the court clerks about her case. She was complaining about the expenditure she was incurring - coming to court only to find that the matter would not be

proceeding. Similar delays were revealed from the observations in the Judicial Commissioners' court. In CO/8/JCCQ/JCS/4.6.87 for example, it appeared from the record that at one point when the matter was to be heard, one party was, on arrival, directed by the Local Court to go to the Central Court. But on arrival there, he discovered that his witnesses had, on the other hand, proceeded to the Local court; where he too had been summoned. The case had been called several times prior to that. On the first occasion, he stated that they had again been summoned, but on arrival at the Local Court, the president was not there. On the second, the summons had different dates. On the third he was alone, and his opponent absent. On yet another occasion subsequent to that, when he arrived he found the court clerk drinking beer sitting with his opponent. On that occasion he went directly to the magistrate who then proceeded to the court immediately. The magistrate then advised him to make a request that his case be heard by the Central Court as a matter of first instance, since the Local Court had failed to serve him. This indicates some of the complications arising out of the implementation of the new rules. Many of these instances are a common phenomenon in these courts.

Another aspect of the Rules stipulates that the courts ought to draw distinctions between what is acceptable or admissible evidence, and what types of evidence are inadmissible or cannot be acceptable as valid for decisions. In other words, the courts ought to draw sharp distinctions between categories such as hearsay and primary evidence, and

so on. They also have to distinguish between the firmness of the evidence of an eye witness and the difficulties attendant on determining guilt or liability by circumstantial evidence. From the observations carried out, however, it became clear that these requirements are still not fully or adequately understood by the people generally. The Acting Chief Justice noted that the rules directing that hearsay evidence is not acceptable; apply equally to the customary courts and the Magistrates Courts. Judge Molai on the other hand pointed out that, the practical reality is that the people do not understand rules such as those pertaining to hearsay, so that in his explanation, people see the new procedure as complicated. As he put it:

... they say if he was told [this evidence] by his father, why should the court refuse his evidence. (Molai: 43.3.1987).

This statement further shows the importance attached to father-son relationships in the traditional setting. But what Judge Molai said confuses the people even more, is that in the so-called chiefs' "Administrative" courts, hearsay evidence is acceptable. Such sharp distinctions between the types of evidence are not made in the "unofficial" courts in which as stated in Allott (1965),⁶⁸ no person's opinion would go unregarded or any fact be overlooked.

What emerged from the observations of CO/4/JCCQ/JCS/ 3.6.87, is that distinctions between what does and what does not constitute hearsay evidence cannot be so easily drawn. This was, according to the respondent's statement, a case of

dispute over land dating back to 1968. As the Judicial Commissioner noted, the claim was with regard to the right to inheritance of land and not concerning the allocation. The counsel for the appellant instead seemed to be questioning the allocation itself, because he claimed that according to the evidence of the respondent, the said land had been allocated to him by the chief's assistant. The logical conclusion he was drawing from the evidence was, therefore, as he said, that all the chief knew of the allocation and the disputes ensuing therefrom, constituted hearsay. The chief in his view failed to give evidence showing direct knowledge of the allocation. The Judicial Commissioner on the other hand, said that the allocation (which he stressed was not at issue here) was quite normal and in order; as the chiefs do not always allocate land in person, but receive reports of allocations made, thus the chief's evidence in this matter could not be held to be hearsay. Two points arise here. First, there is the argument whether the chief's evidence constituted hearsay. But secondly, the debate shows the counsel's failure to keep to the cause for dispute, which concerned the right to inheritance and not the allocation as such.

The lay people as well, do not understand how decisions about hearsay evidence are reached. For instance, they do not comprehend how information given to the son by the father; as illustrated in Judge Molai's statement quoted above,⁶⁹ can be regarded as hearsay. The father in their perspective, is an important figure in relation to the son,

and they do not understand how information passed from father to son can be regarded as hearsay. The standards of parental respect and authority, figured more prominently in the proceedings of some of the observed cases. For example, in case MSLC/4/28.4.87, where the court clerk reprimanded a son, for looking the father straight in the face. In Sesotho custom that is generally taken to be a sign of disrespect. This case was in the Township of Maseru, a clear indication that the forms of authority prescribed by custom, are still not easy to shed even in a community otherwise considered to be urban, and supposedly free of traditional norms and values.

The problem confronting people with regard to selecting what evidence to present to the court does not only arise with the principle of hearsay. Another widespread tendency is to include in the evidence, issues which are not directly connected to the matter presently before the court, and which are therefore not of immediate relevance to the case the court is to resolve. In CO/8/JCCQ/JCS/4.6.87 for instance, the respondent, in justifying his action for taking the matter to the Central Court following advice given by the magistrate, failed to state that it was because the Local Court had failed to offer him assistance. Instead his reason was that, he had another matter before the Local Court already, and for three months nothing had happened. The Judicial Commissioner had to remind him several times to address himself to the current dispute, in stating his grounds why he had wanted the Central, other than the Local

Court to hear his case as a matter of first instance. In addition, the respondent was told that in taking the matter to the Central Court, he had not informed his opponent accordingly, as required in terms of Section 31 of the Central and Local Courts Proclamation No. 62 of 1938. Therefore, the Judicial Commissioner decided, it was wrong for the matter to have been brought to his court on appeal, as Section 31 above had not been observed. He, therefore, referred the matter back to the Local Court. In Case CO/13/JCCQ/JCS4.6.87; the respondent raised an issue relating to "maboella" reserved pastures. The Judicial Commissioner told him that, the matter in court concerned a claim for damages not reserved pastures, and that the respondent had to address himself to the cause of dispute. Problems such as these are not peculiar to the customary courts, but are common phenomena in the received law courts as well, as shall be indicated in the next chapter.

Another crucial aspect in the rules of procedure and evidence in the customary courts pertains to the manner of presenting evidence. The question and answer method of eliciting evidence from the concerned parties and their witnesses, is a new phenomenon to the Basotho, and it accompanied the advent of the more legalistic and inflexible rules of evidence and procedure. According to the Rules, the two parties come to the court as formal litigants, and have to run the case for themselves. They are responsible for all questioning and cross-examining and cannot rely on the court for this, because the court only puts questions to

clear up vague points for itself. The whole procedure is built upon the assumption that the parties come to court as equal contestants or adversaries, having the knowledge of the law and procedure of eliciting relevant and acceptable evidence, to strengthen their positions in the cases.

As argued in the autobiography of Jingoes (Perry and Perry, 1975), the procedure above is beyond the grasp of the average peasant, who has no legal experience of this nature.

The point is that the people are used to telling their story unled, and not to the question-answer method used in the official courts. They find in them, nothing of the "unofficial" courts' procedure in which the parties are allowed to speak out, even about things which might at first appear irrelevant, but may later turn out to be crucial. As discussed previously in regard to CO/8/JCCQ/JCS/4.6.87, for example, the parties still find it difficult to address themselves only to the details of the case before the court, and in many cases, several reminders often have to be made that they should keep to the disputes before the courts. In MSLC/2/23.4.87, for instance, one party made reference to one Mokopela, and the president told him not to speak of people not concerned in the case. In case RSTCC/2/M/30.4.87, one witness included, even the cattle not involved in the case, in giving the descriptions of the items to the court.

As observed in the proceedings before the Maseru Special Local Court, the parties were given a choice, by asking them whether or not, they liked to lead their witnesses with questions in eliciting evidence. Often they chose not to;

preferring to let the witnesses tell their own story of their own accord. This is another indication of how traditional practices are still prevalent in the customary courts. Where the choice to lead the witnesses with questions was taken, several difficulties often emerged. A reminder should be made that the parties would often be carrying out the questioning themselves, as legal practitioners seldom appear at this level, with the exception of some proceedings in the Stock-theft Central Court and the Court of the Judicial Commissioners.⁷⁰ In MSLC/1/23.4.87, the respondent had to be reminded not to interrupt the complainant, but to give her time to finish whatever she wanted to say, that is, before asking her another question. Even where the witnesses were to be led with questions, they sometimes proceeded to recite their evidence. This was the problem in MSLC/2/23.4.87 with one of the witnesses. The court clerk finally had to warn him not to recite "se ka qoqa".

In MSLC/1/23.4.87 also; it emerged that the complainant had problems of asking questions - ran into the problem of formulating them as statements sometimes, which prompted the respondent at one point to state:

You are now telling me [that there was M90.00] and yet it was said you should ask me questions.

At that point, the complainant became blank and could ask no further questions. In case MSLC/2/23.4.87, on the other hand, the respondent had a problem of asking too many questions all in one go, and of repeating himself. At one time one of the complainant's witnesses had to say to him:

"could you ask your question properly". The respondent also had the tendency to make statements instead of asking questions. In RSTCC/2/M/30.4.87, when the prosecutor reminded a witness that he is compelled to answer questions, the witness responded "I too say you should ask them in a manner I will be able to reply to them."

In certain instances it seemed the people did not know what would follow next. A witness in case MSLC/2/23.34.87 for instance, wanted to leave the court immediately before being cross-examined, but was told to wait. She appeared to be confused as if she did not know that she ought to be cross-examined.

As also observed from some of the proceedings, in being questioned, the parties or witnesses would answer, but frequently they would want to elaborate by giving further explanations about their responses. In case RSTCC/2/M/30.4.87, the prosecutor had wanted to stop a witness from giving further explanation; and said, "you have not answered me, I don't want those reasons "mabakanyana" of yours". In retaliation, the witness responded:

Me too, my statement should be noted as of some strength ("e tsoanela ho behoa matla a mang").

Later on another argument broke between the same witness and the prosecutor. The witness had wanted to indicate that the chief and headman were different people. The prosecutor said:

When I speak of the "morena" chief, I actually mean the same "ramotse" headman. It is the same thing.

As described earlier, the witness could not be convinced by this explanation. As a result the prosecutor wanted to give a further explanation, only to be stopped by the president who said they should address themselves to the case in question.

Another kind of difficulty arose in cases in which a relative would be representing a party, or assisting him to conduct the case. Often these relations gave evidence as if they were the parties themselves. On the principle of the hearsay rule, such evidence is usually excluded on appeal to the superior courts and, if it were the only evidence, the party would be bound to lose the case on appeal, particularly where he was the plaintiff. But of course the people are not aware of the full implications of this; and of the attendant consequences. In CO/24/JCCQ/JCS/10.6.87 for example, the appellant was represented by his wife. In giving the grounds for the appeal she said "I do not understand to pay compensation for ...". Before she could even complete her statement, the Judicial Commissioner interrupted saying:

You are not the party making the claim.
You are simply appearing on his behalf
though you suffered injuries, which were
confirmed by a doctor, in person.

In this case, although the woman in court was the one who had suffered the injuries, as a married woman, she could not make the claim on her own behalf because she is by law a minor. On the defence side, the husband was the one in court, although there was a counsel.

A peculiar situation occurred in CO/26/JCCQ/JCS/10.6.87. The respondent was not in court in person⁷¹ but represented by someone. The Judicial Commissioner asked the representative "why are you [the one] appearing, are you a lawyer?" The representative claimed they were cousins with the respondent. The Judicial Commissioner proceeded to read out the provisions of Section 20 of Proclamation No.62 of 1938, and then asked the representative again:

Where do you fall? You are not husband
to the party, nor guardian, nor servant.

The Judicial Commissioner then called for the letter the representative was holding. It was from the chief, but the former said it did not state that he was a cousin to the respondent. When the appellant was asked whether he agreed to the representation, he stated that the two were mere friends, and further mentioned that it was understandable how the letter presented to the court had the chief's stamp - it (the stamp) is kept by the respondent himself. The appellant requested that the opinion of a more senior chief be sought, otherwise he was not agreeing to the said representation. The Judicial Commissioner was aware that the respondent had been in court earlier, he summoned for him. In the meantime he whispered to the assessor "this is an obstruction of justice". After a brief adjournment while the respondent was being looked for, the court resumed. The respondent was told that he would speak for himself as the appellant claimed his representative was not recognisable under the law. He finally lost the case. This raises

serious thoughts about how many of such irregularities, occur at the lower structure of the customary courts and go through without detection. It is also a crucial factor in the light of the reality that, only very few cases ever reach the level of appeal before the Judicial Commissioners' Court.

Examples and descriptions of what happens in the customary courts in real practice, cannot be dealt with in one piece of work, but the ones given in this chapter should suffice to demonstrate the main features of the customary courts, and the extent to which changes in the organisational structure, jurisdiction and the law of procedure and evidence have been effected, 50 years since the 1938 reforms were proclaimed. Taking the argument that legal changes in Lesotho actually date back to 1884 or even to 1871 (Burman 1976, Mokoma 1984/85), it is in fact over a century since such changes were introduced; yet various complications fostered by factors in the social environment within which these courts operate, predominate the proceedings in these courts as the descriptions demonstrate.

CONCLUSION

The foregoing descriptions strongly suggest that, a view which deals with the customary courts without linking them to the "unofficial" chiefs' courts, presents an incomplete picture of dispute settlement processes operating in the country today. In other words, it confirms the assertion that the omission of either, or rather failure to recognise that there is a kind of harmony or concord existing between

the two; leads to an incomplete picture of the actual judicial processes.

The descriptions also lead to the conclusion that the adversarial rules have not gained a stronghold, instead they are redefined at the advantage or convenience of both the court personnel and the Basotho people in general. Within this process of redefinition, much regard is still given to indigenous judicial practices. Thus the operationalisation of many aspects of the adversarial principles, within the context of the customary courts structure in Lesotho, merits careful consideration. The question is whether these courts presided over by "magistrates" not professionally trained in law are in any way different from the "unofficial" courts in the manner in which they operate. Whatever the response may be, what is most apparent is that what is happening in these courts is not similar to the position prevailing in the received law courts either. The system of customary courts instead, represents a hybrid or composite system resulting from the cross-functioning of principles deriving from the indigenous mechanism of dispute settlement on the one hand, and those originating from the principles of the received law on the other.

To some extent, the customary courts represent a system with attributes of a western adversarial system. In theory, they have to apply customary law only within the confines of the received law; also insofar as it does not conflict with the latter, and if not inconsistent with the rules set for their guidance. The extent to which these

principles apply, has resulted in an oddly skewed and truncated version of the law. The adversarial rules and statutes operating in the customary courts, are of a fashion very different from those in the received law courts. This is because the expectations and ideas that the people bring to bear in the practice of the customary courts, are based on their experience of a different form of dispute settlement, and these affect how they make sense of the transplanted (received) model. On the whole what they know is the indigenous process for dispute settlement used in the "unofficial" chiefs' courts. Thus what we have in reality is a system composed of aspects of western-oriented law, which has implanted into it; practices deriving from the indigenous system. In between them, is a fringe where the two interpermeate in a highly complex process of interaction.

At the same time, the customary courts cannot either be held to be performing in exactly the same manner as the chiefs' courts in the "unofficial" judicial structure. Rather the customary courts, as some of the interviewed informants unequivocally indicated, are far more formalistic, and much of the flexibility of the "unofficial" courts cannot be recaptured because of differences inherent in the social structure surrounding the two. Certainly the flexibility of the chiefs' courts may not continue to be effective in securing justice, when the "judges" in the customary courts are no longer selected from among the local communities, and are thus no longer conversant with the people in their respective villages; with the customary law and daily

practice, and with what the people expect from the courts. If people less knowledgeable and less interested in reconciling parties are appointed (as represented in the powers given these courts to even imprison), the same looseness of procedure may not be conducive to justice and it may be necessary, therefore, to lay down strict rules.⁷²

With the implementation of the 1938 Proclamations over the years, the position of the customary courts in relation to the "unofficial" courts structure has been quite an interesting one. There is what may be termed a "continuity" between the two; which becomes obvious when examining the way they function. Jurisdictionally, the responsibilities of the "unofficial" and the official customary courts seem to converge. For instance, the Acting Chief Justice pointed out that in all minor criminal matters, people ought to be referred to the Local Courts under the law. However, he further explained, that in practice:

... When you later claim compensation you may go to the chief, and then if a man says I offer R30, Well you [he] may hand it over in front [the presence] of the chief, and that is the end of the matter. If you say R30 is not enough and the other [party] says that is the only thing I can offer, then it will have to go to a court of law ... (Kheola: 16.2.1987)

The chiefs quite obviously manage to settle a lot of these matters, out of the official courts of law.

Further suggestions concerning this "continuity" are pointed out in Hamnett (1975). He indicates that, many court clerks refuse to register cases, unless the litigant produces a letter from his chief. This, as he points out is

illegal, but is a practice connived at by both the courts and chiefs, and where, as often is the case, a disputant is not sufficiently literate to cope with the formal side of his case, the chief and the "arbitration court" perform an essential function in helping him to complete the formal procedure and prepare himself for the hearing.

In the present day, as confirmed by the Director of Public Prosecutions and Resident Magistrate Mohale, the practice of asking people coming to the Local Courts whether they have letters from their chiefs, still persists despite its "illegality". In addition, the acceptance of the practice as a necessary way of doing things by the Director of Public Prosecutions and Chief Magistrate, raises doubts whether it is in reality regarded as "illegal" and even "unofficial". A more revealing observation was made in the Maseru Special Local Court on 27.4.1987. Before the proceedings started for the day, a woman was discussing a matter involving some money which had been brought to the court. As it emerged from the discussion, she was owing someone an amount of M5.00, and had been unable to pay, so her lender was suing her for non-payment. The woman was indicating to the court clerks that she now in a position to pay. The court clerks advised her to go back to the Chief (Mabote) to discuss the matter, and settle it out of court. She was told that she could indicate to the Chief that she wanted the matter to be settled before him and not be brought to the Local Court again. This is evidence of encouragement by official court personnel, advising a member of the public

to pursue her matter (already before the courts of law) and settle it in an "unofficial" structure, which is, under the law, not supposed to exercise judicial powers.

Once the case is before the court, the chief's responsibilities do not cease. He could make sure that witnesses are cited, and decisions reached by the court should be communicated to him, so that he ensures that their terms are understood and followed through. In criminal matters, the evidence of the chief is often a decisive element in the case, and he is frequently an important witness in civil actions as well, not least of course in matters concerning the allocation of land. The role of chief in the administration of justice is thus an important one even at this level, and in various ways (Hamnett 1975), pointing further to the element of "continuity" between the chiefs' courts and the customary courts.

From the observation of the operation of the customary courts proceedings, and from the interviews that were carried out, another conclusion that can be drawn, is that the procedures followed are not formalistic to a large extent, but are in fact so discretionary that, as said once before, they amount to a process of a new law in the making. Not only are the received law standards of procedure and evidence frequently overlooked, as demonstrated in some of the cases cited in the preceding sections, but in addition, principles of the indigenous law and procedure are resorted to whenever felt necessary and convenient, because the presiding officers have inadequate legal training, hence they lack an

understanding of the received procedures and evidence rules.

The people too are comfortable with the old ones. This suggests that "rules" as such are not fundamental in the Customary Courts. The familiar formal law model of linking "facts" to "rules" to deductively arrive at a legal decision, does not necessarily seem to apply here.

It is clear that in the operations of the customary courts structure, there exists a combination of norms and practices emanating from the chiefs' courts and the received law courts respectively, exerting pressure upon and influencing the manner in which the adversarial rules of procedure and evidence are put into force. This pulls the practice in these courts in different directions; producing a system built on compromise and blending of various procedures. However, it cannot be denied that the change in the nature of the judicial process as set up by the colonial administrations, has been a relatively profound one. It has meant loss of flexibility and informality in the proceedings to some measure, making the present customary law and its system of courts an amalgam of traditional and many imported factors, especially as regards their structure and philosophy. These have had an enormous impact, not only on customary courts, but in dispute settlement in general. Therefore, any accurate portrait of the judicial system must take all of these factors into account.

CHAPTER 5

THE OFFICIAL COURTS II : THE RECEIVED LAW COURTS

The received law courts structure forms the second level of the official courts' hierarchy. It is composed, first, of the Subordinate (Magistrates) Courts at the lowest level, above which stands the High Court, and finally, is the Court of appeal at the apex. The descriptions in this chapter are in the main restricted to the first two, although in describing the structure of these courts, the court of appeal is included.

The chapter first deals with the issue of the relationship between the received law courts and the customary courts, both of which as mentioned once before constitute the officially recognised judicial structure. But in addition, attention is given to the argument that the received law courts represent the more adversarial structure, than appears to be the case with the customary courts. The analysis of the relationship between the two sets of courts, starts off with the descriptions about the organisation and the jurisdiction of the received law courts. Certain characteristics determining the relationship between the two are discussed. These include such aspects as geographical jurisdiction, and jurisdiction in the terms of both offences and punishment. In this regard it shall be illustrated that the received courts possess more wider powers than the customary courts and that in that respect they occupy a position of seniority.

A different line of thinking from the one currently depicted in the existing literature, which views the official courts structure not only as dualistic; consisting of the customary courts and the received law courts, but also sees the two as functioning parallel to and in conflict with one another is offered. What comes out of the descriptions made in this section is that while here one may not necessarily talk of the "blending" of procedures accruing from processes of different origin, even at this level of the official courts one finds a hybrid system whose character is highly influenced by cultural determinants operating in the "unofficial" and the customary courts. What will be argued is that the received law courts appear to be adversarial in theory more than in practical terms. Examples of courtroom observations are used to validate this argument, pointing at a number of factors that prevent these courts from operating according to the adversarial rules.

The next area of focus in the chapter pertains to the nature of proceedings of the received law courts and the question of how these are closely linked to their counterparts in the western world. First, the point that the proceedings in the received law courts differ from those in the customary courts and even more from those of the "unofficial" chiefs' courts shall be made. This, it will be argued, is primarily evidenced by the fact that the received law courts proceedings place high emphasis on rules contained in legal texts. Also that these rules are inclined towards western legal theory and the adversarial model. To this extent, it is argued that it

would be possible to draw some comparisons between the received law courts and how the adversarial model has been found to work in other parts of the world. The degree to which such analysis is possible would prove valuable for purposes of comparative legal study. Reference is made to the trend set in the Sociology of law studies which Abel (1979: 167) has termed "the genre known as impact studies, or studies of law in action". Included here are such works as those of Blumberg (1967; 1969), Carlen (1976), Bottoms and McClean (1976), McConville and Baldwin (1977), McBarnet (1981), and Ericson and Baranek (1982), just to mention a few. But as shall be concluded, while these studies may be of relevance in this case, their findings cannot be applied without further elaboration and qualification.

The following descriptions also make use of the data obtained from the conducted during the field research, to demonstrate what goes on in the practice of the received law courts other than at the theoretical level. The next chapter also shares a similar focus - mainly the received law courts - but deals mainly with aspects relating to legal representation. Hence they may be an overlap between these two chapters.

THE RECEIVED LAW COURTS: STRUCTURE AND JURISDICTION.

The label "received law courts" is employed here in the sense of the primary law administered by these courts. However, in terms of its unlimited jurisdiction, the High

Court applies both the received law and the customary law, and so does the Court of Appeal. In practice though, the majority of matters of custom tend to be confined to the customary courts as described in the previous chapter. The fact is that only a minute percentage of appeals against decisions of the Judicial Commissioners' Court ever reach the received law courts, namely the High Court and the Court of Appeal.

This is so despite the fact that as Maqutu (1981) observes, 99 per cent of the people of Lesotho are Basotho to whom Sesotho custom and law can apply. He further alleges that the Magistrates Courts in general terms avoid custom; even at this time when these courts are entirely staffed by Basotho. To some extent, the same could be said of the High Court more so because at the time of the field research, all of the judges who were in office were Basotho.¹ As things stand, the magistrates deal with customary law cases only when they review them in terms of section 26 of the Central and Local Courts Proclamation. The High Court on the other hand, deals with Sesotho customary law matters only when they come on appeal from the Court of the Judicial Commissioners, despite its unlimited jurisdiction to hear all matters; including those involving the customary law. The point to be remembered is that the Magistrates Courts are creatures of statute, and thus in the absence of any specific provisions giving them jurisdiction over cases arising out of the customary law, they cannot deal with disputes of the kind handled by the Central and Local Courts. Consequently, the

courts that primarily apply to the customary law are quite distinct and set apart from those applying mainly the received law, although they are both officially and legally recognised as the institutions possessing judicial powers, as against "unofficial" chiefs' courts. This implies that the most senior courts of the land are inaccessible, in the sense that matters of custom, which affect the majority of the people, cannot be taken to them. Hence it would be correct to conclude that the superior courts of the land are reserved mainly for cases arising out of the received law.

The Subordinate Magistrates Courts hear cases as a matter of first instance. They are so entitled, because they are subordinate to the High Court and it would, therefore be correct to view them as "forming the bottom of the common law courts" as stated by Judge Molai. In this thesis they are referred to as the Magistrates Courts because this is how they are referred to by the Basotho - "ha'maseterata" (at the magistrate's) is the term used in the local parlance - the reference title of Subordinate Courts being employed mainly within legal professional circles. The Magistrates' Courts stand subordinate to the High Court hierarchically and jurisdictionally, and above is the Court of Appeal, the latter two being appellate courts, for cases from the lower courts of all jurisdictions including the customary courts. As stated by the Attorney General, these courts are numerically fewer in comparison with the customary courts. Additionally the Acting Chief Justice Kheola stated that the most serious factor is that the "formal" courts (in particular

the received law courts) are located too far away from the people they serve. Thus the received law courts are inaccessible to the people in another sense too, which is that they are not in close proximity to the people.

In terms of geographical jurisdiction, the received law courts possess powers that extend over wider areas. In addition, their jurisdiction with regard to judgements they can impose, such as amount of fines and the length of term of imprisonment they can give, tend to be greater and harsher. In general they are also empowered to take on matters considered to be of more serious nature than the customary courts. That the received law courts occupy a position of seniority than the customary courts, is further confirmed by the fact that the Resident Magistrates have powers of control and review over what happens in the Central and Local Courts, for instance, in the event where a Customary court has given a prison sentence. In addition, the High Court and finally the Court of Appeal (where and as need arises) have powers to resolve appeals coming from the Judicial Commissioners' Court, which can in a way be considered as the highest in the customary courts structure.

THE MAGISTRATES COURTS: THE ORIGINS OF THE MAGISTRACY.

The first attempts to establish the magisterial system date back to the period of colonial rule. With the division of the country into districts², the Cape government placed each under the jurisdiction of a magistrate who was in turn

answerable to the governor's agent. The magistrates were part of the plan to abolish customary law and practices, except that in their view this objective was to be introduced cautiously and not hurriedly, to avoid confrontation with the Basotho chiefs and their people.³ In terms of Proclamation No.51 of 1871 each of the Resident Magistrates in the established districts had unlimited jurisdiction both geographically and in terms of powers. The Governor's Agent was the Chief Magistrate (Lagden, 1909; Crawford, 1969). Offences for which the death penalty could be imposed were to be tried before these magistrates or their assistants.⁴ With the Cape's policy of direct rule, an attempt was made to bring all matters of some seriousness within the jurisdiction of the Magistrates Courts. This struck a blow at the roots of the indigenous system for the administration of law and justice. The chiefs' courts were, however, still afforded a good measure of toleration (Hailey 1953) and appeal lay from their courts to the courts of the Magistrates.

In 1872, the position of the magistrates was reinforced and strengthened through the introduction of a police force. The Cape government argued that magistrates provided a more effective way of settling disputes than the chiefs did. Within the courts, a flexible approach was adopted towards the Cape rules of evidence, in order to decrease the people's feeling of unfamiliarity with the new courts procedures. During this period the magistrates gained enough support from the people in settling most of their cases, despite initial opposition from the chiefs. Such success led to the decision

to extend the scope of the new regulations on the recommendation of the special commission of 1872, which was appointed to inquire into the Native law and customs of the people of Lesotho and also into the operation of the regulations established for their government (Burman 1985).

Through the recommendations of this commission the Cape law for the first time came to apply in Lesotho except where parties was "Natives" meaning, the Basotho. The proceedings of disputes between the Whites and the Basotho were to be, as near as possible, the same as those in the courts of the Resident Magistrates in the Cape Colony [sec 24] but a fair amount of discretion was allowed the magistrates to decide how rigidly to apply colonial procedure. The result was that the received law came to be applicable to all the inhabitants, while the indigenous law was, in addition, to remain applying to the Basotho people. Such rapid and radical transformations, generated considerable unease and discontentment among the people as they impinged upon various aspects of their life. In the context of this thesis the main issue is that a new system of law and the administration of justice was introduced. Recognition should be given to the fact that the Basotho had before this known no other system of law and justice than their own. The efforts encompassed in the new rules were a direct cause of the rebellion by Moorosi and his sons which finally culminated into a revolt that shook the balance upon which the whole system of the magistracy rested. The pursuit of the disarmament policy was the last straw - it led into the famous Gun War (1880-

1881), and brought the magisterial authority to a point of collapse.

The second stage of the magisterial rule came following the disannexation of Lesotho from the Cape by Act 34 of 1884. The British ruled through the Resident Commissioner for South Africa. The system originally introduced by the Cape Colony, was, however, not significantly altered as magisterial rule was also revived run by District Commissioners. The British government's policy since "the Gun War and the conquest retrocession of Lesotho to Britain" (Crawford, 1969) was to leave the chieftaincy very much to its own devices, leaving customary law to continue being administered by the chiefs courts in cases between Africans, a policy consistent with indirect rule. The relevant provisions made no significant change except to give the chiefs jurisdiction over minor civil and criminal cases. Their judgements were, however, made subject to review and scrutiny by the Commissioners. The courts of the colonial administration concerned themselves very little with African matters except in the case of serious crimes. This tends to suggest that the lack of interest in the matters of Custom by the received law courts is a feature inherited from the past.

Many of the aspects spelt out above were maintained in subsequent years, as would certainly be obvious from the 1938 Proclamation No. 58, which instituted the Subordinate (Magistrates) Courts in the manner described below.

THE MAGISTRATES' COURTS AT PRESENT.

The present phase of the Magistrates' Courts has its origins in the Subordinate Courts Proclamation No.58 of 1938. Then the system was based on a few legally qualified magistrates, supplemented to a large extent by administrative officers. The Subordinate Courts were divided into, ranks called classes. The Senior District Officers and District Commissioners could hold Courts of First Class; whereas junior District Officers could hold Courts of the Second class; and the Cadets those of the Third class. Most of the Magistrates then possessed no legal training whatsoever, and they performed both administrative and judicial functions. A few of them were borrowed from South Africa, and as the Chief Magistrate pointed out in an interview the first "Black [Basotho] magistrates came into service after Independence, and these were offered some local in-service training". With the realisation that "local law" training is inadequate, agreement was reached with the University of Lesotho to launch a Diploma in Law course in order to upgrade the standard of the legal education for the magistrates.

One major change that has so far been implemented is that the judicial powers that Administrative Officers used to possess have now been taken away. So that the system now operates through full-time magistrates all of whom are now Basotho. The current position of magistrates in office as summed up by the Chief Magistrate is contained in Appendix E. There are Magistrates' Courts in each of the 10 District Headquarters and each can be manned by several magistrates of

various ranks. As indicated by the Acting Chief Justice there are more magistrates in the busy districts, that is, where there are higher caseloads. But as further explained by the Chief Magistrate Matete, it is thought necessary to have a Resident Magistrate at least in each district, but due to shortages of qualified manpower this is at the moment not possible. In those districts which have no Resident Magistrates, the duties are met by those from the neighbouring districts.

To this day many people still regard the magistrates as still performing both the administrative and judicial roles without any distinction this can be illustrated by an incident which occurred while I was temporarily employed in the High Court as a student-assistant, whereby a couple came to the offices and said they wanted to have their marriage solemnised. I recall quite vividly one of the High Court interpreters telling them that "Here, we do not solemnize the marriages, we dissolve them". The couple was then directed to the relevant office where they could obtain the service they required.

In an interview Judge Molai stated that, one often hears people saying "we had our marriages solemnised at the court or at the magistrate's" ("ha'maseterata"). As the Judge further pointed out:

When we talk of marriages we talk of dissolving them. Because marriages are solemnized at some other place not at court, although our people commonly say "we are going to solemnize the [the wedding] at the magistrates". The magistrates don't solemnize marriages, that is administrative. The courts come

into the picture when the marriages are to be dissolved ... Civil marriages are solemnized at the District Commissioners Offices or at Church. Their dissolution is done only by the High Court (Molai : 6.3. 1987)

The argument that follows from the above statement is that these courts are specialised, in the sense that their sole purpose is to administer the received law in the context of disputes brought before them, a specialisation reinforced by the fact that proceedings before them are conducted in places not used for other purposes.

The Subordinate Courts Proclamation referred to earlier has been amended several times. For example, in 1964; the constitution of the Magistrates Courts was altered, but this arrangement was subsequently left unchanged by the Independence Order of 1966. The arrangement made provision for 5 (ranks) classes of courts namely: the Resident Magistrates; First Class; Second Class; Third Class; and Special Class Magistrates.⁵ At the present moment the arrangement remains largely the same,⁶ and while there is one Third Class Magistrate in service, the Special Class Magistrates are still non-existent. As far as the Chief Magistrates could recall, the only time when there were Magistrates Courts of this class was following the employment of the first graduates of the Diploma in Law Course.⁷ Their functions were similar to those of the Third Class Magistrates. Judge Molai recalled that at some point in the past there was a magistrate of this class in the district of Teyateyaneng and his explanation for this was as follows:

I think there was no magistrate in T.Y.-

there were no sufficient magistrates in the country and probably that [District] was without a Magistrate and before a Magistrate could be appointed work had to be done. (Molai: 6.3.1987).

There is still provision for the courts of this classification; and it is the duty of the Chief Justice to prescribe or create this class of courts if and when he feels necessary. However, there are serious considerations to scrap both the Third Class and a Special Class ranks of the Magistrates Courts.

The Resident Magistrates may exercise powers and jurisdiction conferred on any magistrate of another class, and their jurisdiction and powers extend over the length and breadth of the country. Other Magistrates exercise only such powers and jurisdiction as may be specified in their respective appointments, and as may from time to time be prescribed by the Chief Justice. The Magistrates Courts in the first instant administer the received law and statutes. They have summary jurisdiction first, over all criminal offences except treason, murder and sedition, though this category of exception may be enlarged in respect of the Special Class Courts. There are also limitations on the punishments the different classes of the Magistrates Courts may impose. That is, as explained by the Acting Chief Justice, the sentencing powers of Magistrates of different ranks varies in accordance with statutory limits prescribed for respective Classes, and as he continued; "that is why they are called courts of limited jurisdiction". Where sentences have exceeded the given jurisdiction, the decisions

ought to be reviewed.⁸

Briefly, their criminal jurisdiction as stipulated in the Law sets out the nature of the offence, the area within which it is alleged to have been committed, and the maximum punishment that may be imposed, the review of and appeals against convictions or sentences of individual courts, and the manner of the enforcing orders and sentences of a court.⁹

All Magistrates, except those of the Third Class also have power to give corporal punishment, and the statutes state how much strokes the various ranks of Magistrates are empowered to give. As Judge Molai expressed it:

Why the Third Class Magistrates are excluded here, it has never been clear to me, because the Local Courts administer custom, and in our custom they do administer corporal punishment (Molai: 6.3. 1987).

Apart from their summary jurisdiction in criminal matters, the Magistrates Courts may have cases remitted to them for trial or sentence. The remittal may be under the ordinary jurisdiction of the court or under increased jurisdiction. In the same manner they may transfer proceedings commenced in them to a Central or Local Court, if in the opinion of a Magistrate's Court the matter would be more conveniently and appropriately dealt with in such court. In addition, they hold Preparatory Examinations¹⁰ to determine whether or not an accused should be committed for trial by the High Court; this would be in the cases of murder, treason and sedition. That involves taking all the evidence and making a decision as to whether there is a case to be heard

in the High Court or whether there is no case to answer. In the event of the former, necessary arrangements are made for the case to proceed to the High Court, while in the latter decision can be made to discharge or dismiss the matter.

Once a criminal case has been investigated by the law enforcement agencies - police - it has to be tried in a Magistrates Court in the first instance. However, as stated in the previous chapter, the local Police Officers have the discretion to refer certain matters to the customary courts, and while such referrals ought to be with respect to "minor" offences, it was also pointed out that sometimes cases so referred, appropriately fall under the jurisdiction of the Magistrates' Courts. This is why the Acting Chief Justice pointed out that:

All statutory offences have to come to the Subordinate Court. It is only the Land Act which provides for cases to be taken to the Local Court, most statutes don't. If a person has contravened a statutory provision then he has to be taken to a subordinate court, because it may involve the interpretation of that Act (Kheola: 16. 2.1987).

The argument of the Acting Chief Justice was that the personnel of the customary courts is not well qualified to deal with questions concerning the interpretation of statutes, nor are they entitled to do so under the law. However, as said earlier on, some exceptions are made where it is felt that some offences are of minor nature, in which event the customary courts are let to proceed with them. As Judge Molai confirmed some cases that ought to be heard by the Magistrates are referred to the Local Courts and

similarly he attributed this to the police discretion.

An additional point which emerged from the interviews with various informants¹¹ is that most cases that come before the Magistrates are criminal ones. The Chief Magistrate, pointed out that the rate and form of the criminal offences vary from place to place. In the mountain areas, such as Thaba - Tseka, Mokhotlong and Qacha's Nek, stock-theft cases appear to be top on the list. The point that stock-theft is very high in Qacha's Nek in particular, was confirmed by the Attorney General, who in addition mentioned that these are difficult to resolve because the area is not easily accessible for investigation of the crimes and they tend, therefore, to accumulate. In the urban centres, the Chief Magistrate said house-breaking is one of the most common type of offences. Furthermore, he noted that rape (highest in Mafeteng) rises during certain seasons, "when people get into the festive mood" (e.g. Christmas time). During the winter months house-breaking into shops was mentioned to increase, with people stealing such commodities as blankets and food stuffs. Ordinary shoplifting on the other hand increases during Christmas times. The Chief Magistrate, in addition, stated that homicide is high in urban areas which he attributed to the high incidence of mobility of people in and out of these areas, and also to the availability of a variety weapons including firearms.

Traffic offences seem to be very high especially in Maseru, (the capital), and the vicinity. As mentioned by the Attorney General Maope, there are many outstanding traffic

cases which have not been heard for years. In Maseru in particular, because of the increase of traffic cases, a separate court now known as the "Traffic Court" has been established for organisational purposes and for administrative convenience. This is not a special court but is a Magistrate Court of Maseru, and different Magistrates in the area preside over it in turns. The prosecutors too exchange with the crown counsel(s) from the Law Office coming into play in the most serious cases, otherwise the traffic police take on the prosecution of the traffic cases.

The civil jurisdiction of Magistrates also differs according to rank.¹² The Resident Magistrates' Courts and the courts of the First and Second Classes have civil jurisdiction over actions founded upon liquid documents, actions relating to the delivery of property and other actions, within certain financial limits. The Chief Magistrate, Senior Resident and Resident Magistrates cannot take civil matters in which the claims involved are in excess of M2.000; for the First Class Magistrates the maximum limit is M1.000 and M500 for the Second Class Magistrates, while the Third Class Magistrates have no civil jurisdiction at all. The special Class Courts may be allotted such jurisdiction as may be specified in their establishment. So that the choice of proper forum to which court an individual takes his civil cases depends on the amount of the claim involved.

Certain civil matters are excluded from the jurisdiction of the Magistrates Courts¹³ and these include dissolution of

marriage, or separation from bed or board or goods of married persons; the validation or interpretation of a will or other testamentary document, the ascertainment of the status of a person in respect of mental capacity (except as provided by any law in respect of mental health); matters where a decree of specific performance of an act is sought without an alternative payment of damages (except the rendering of an account or the delivery or transfer of property),^h were a decree of perpetual silence is sought, and also where provisional silence is sought. These fall under the jurisdiction of the High Court.

The Chief Magistrate indicated that it has come to a stage where it is necessary to separate civil from criminal work in the Magistrates Courts of Maseru. Therefore, Fridays have been set aside for this purpose. This seemed to confirm the point made by Crown Counsel Ntsonyana that, while most cases that come before the Magistrates and the High Court consist mainly of criminal proceedings, it seems people are becoming increasingly aware that "they can bring proceedings [sue] for other things as well". She was referring mainly to civil matters here, which, however as she further explained often come to be settled out of court. These are "mostly commercial cases". In the words of the Chief Magistrate they include:

... companies, where dispute arises. Perhaps a company is suing a bank, or owing another company. Insurance claims are not so many. The reason why we don't [deal with them so often] is that in terms of the Motor Vehicle Insurance Act, it is easier to settle out of court. Once you have submitted your claim and

they are satisfied that they are liable; they just paysome lawyers just specialise on that, because it is not difficult to submit a claim. (Matete: 18.5.1987).

Among civil matters which appear to be on the increase in the Magistrates Courts, the Attorney General mentioned maintenance claims which he said result from the numerous divorce proceedings. In his opinion, though, these do not exceed traffic offences. The main issue with regard to the former is that:

...There's reluctance to handle them. Because you find they're family disputes, and obtaining sufficient evidence in this regard is difficult. Therefore, they're accumulating; many of them are outstanding. (Maope: 16.2.1987).

Since Magistrates Courts exist in all the 10 Administrative District Headquarters of Lesotho, the advantage of bringing an action in them than in the High Court, is that less delay is encountered before trial. Also the scale of costs is relatively lower in the Magistrates' Courts. But in the opinion of Judge Molai, the proceedings in the Magistrates Courts are still expensive because as he stated "the lawyers are very expensive". This is particularly true when one considers that in the customary courts the people mostly appear on their own; incurring no expense of acquiring services of a legal practitioner.¹⁴

The above, in addition to describing the organisation and jurisdictions, also gives a brief overview of the kind of cases that will commonly be brought to the Magistrates Courts in real practice. This is further demonstrated in

the examples analysed later.

THE HIGH COURT.

The first provision for the High Court came in Proclamation No.57 of 1938. Prior to that the Resident Commissioner's Court exercised similar functions and jurisdiction, which dated back to 1884 when Lesotho was restored to British rule. The Court of the Resident Commissioner was vested with unlimited jurisdiction in both civil and criminal matters, and it applied rules similar to those of the Resident Magistrates Courts of the Cape. Over the years various Proclamations reforming the constitution, jurisdiction and powers of this Court have been introduced including the change of title to the High Court. In 1954, with the constitution of the Court of Appeal; the 1938 Proclamation was replaced by Proclamation No.19 of 1952. During most of the colonial period Botswana, Lesotho and Swaziland, shared a common High Court with a common personnel. But in 1965, separate appointments were made for the office of Chief Justice. At Independence, the High Court of Lesotho became constituted under the 1966 constitution, which also latter became consolidated and amended through various enactments.¹⁵ But many of its original characteristics including its unlimited jurisdiction were left unchanged, and remain the same as they existed under 1938 Proclamation.

The High Court administers first, the received law and secondly the customary law. As described earlier in the case

of the latter it mainly hears appeals from the Court of the Judicial Commissioners. With regard to the former it has unlimited jurisdiction to hear and determine any civil and criminal proceedings, involving among other things claims relating to fundamental human rights and freedom.¹⁶ In addition, it deals with questions as to the interpretation of the law and statutes arising in the Magistrates Courts and the Judicial Commissioners' Court, determining any persons interests and rights over property that has been compulsory taken possession of, or whose interests and rights over property have been compulsorily acquired, and so on.

This is also a court of first instance in murder, treason, sedition and divorce (in civil marriage)¹⁷ cases. As stated by Judge Molai, criminal cases constitute the bulk of the High Court's work. This would be in cases which magistrates have taken a Preparatory Examination and have committed an accused for trial before the High Court. In this instance, the High Court sits as a court of first instance and as such will hear all the evidence. However, not necessarily all people or witnesses who were heard by the Magistrate Court, in a particular case, are called to appear and give evidence. The Crown counsel from the Law Office (not a public prosecutor attached to a Magistrate Court) looks at the witnesses who testified before a Magistrate Court at the Preparatory Examination and having read their dispositions, selects those he feels would be needed to establish the case before the High Court. The defence is also given an opportunity to call whatever witnesses he wants

to summon.

According to an explanation offered by Crown Counsel Ntsonyana, many (actually the majority) civil cases such as divorce matters for instance, often end up being settled out of court by agreement of the parties concerned, who do not want to speak out "ho pepesa" about matters of their private life in public. This is an issue similar to that raised by Merry (1979) that is disputes of a domestic nature, people are usually reluctant to involve law enforcement agencies as this may cause long-term disagreement between the parties to emerge. She also stated that as a Crown Counsel from the Law Office dealing with civil work, she only appears in cases where the Government is a party, and that in most cases where it is pretty obvious that the government is at fault; the matters get settled out of court, thus avoiding the cost of litigation. Otherwise, private claims concerning members of the public are taken on by private legal firms or the Legal Aid Office where applicable. As the Director of Public Prosecutions indicated, lawyers who do criminal work in the High Court are from the Law Office as well. The same applies in civil cases in the Magistrates' Courts. In criminal cases before the Magistrates Courts on the other hand, the prosecution is carried on mainly by the police and public prosecutors who are attached to these courts.

This was confirmed by Judge Molai, who indicated:

It is not the public prosecutor [from the Magistrate's Court] who appears before me [in the High Court], but a senior man from the Law Office. He is a Crown Counsel, a man educated in law (Molai: 6.3.87).

Usually the police prosecutors and the public prosecutors possess no legal training and do not appear in the High Court. In Maseru there are a handful of prosecutors who hold Diploma in Law qualifications. In the Traffic Court, a Crown Counsel with more senior qualifications prosecutes only in more serious cases.

This indicates that the personnel who prosecute in criminal proceedings are not of equivalent standards, in terms of their knowledge of the law and training. This tends to suggest that the Crown Counsels "the senior man educated in law" appear in the High Court which deals with matters considered as of outmost seriousness, thus leaving the not-so-qualified public prosecutors to carryout duties in the Magistrates Courts. From the observations carried out during the period of the field research, it was discovered that a vast majority of criminal prosecutions in the Magistrates Courts are in fact police prosecutions with other public prosecutors appearing in a minority of cases. In proceedings of traffic offences, house-breaking, rape, it was often the police prosecutors appearing. The implications of how this affects the course of proceedings in real practice are dealt with later on, when looking at how the received law courts operate in relation to the rules of procedure and evidence set down for their guidance.

The Chief Magistrate confirmed that criminal cases, especially murder proceedings, form the bulk of the matters that come before the High Court. While the Director of Public Prosecutions agreed with the point that the most

common type of proceedings in the High Court involve cases of murder, he further pointed out that an additional fact is that murder trials tend to take much longer. As he put it:

A criminal [murder] case takes about eh
... we start on Tuesdays and it goes on
until say about the following Tuesday of
the next week (Peete: 30.1.1987)

As observed during the fieldwork, sometimes the proceedings in murder cases continue for 2 weeks; and almost every week there are at least 2 murder trials in the High Court. As the Director of Public Prosecution further indicated, the whole situation is complicated by the fact that from the time of the commission of an offence such as a fraud case, it is very difficult to get the police to obtain sufficient evidence to enable the prosecution to take a decision to prosecute. A further example provided by the Director of Public Prosecutions is that of ritual murder cases which he said are also difficult to investigate. This is a point similar to the one referred to earlier on, in which the Attorney General pointed out that stock-theft cases are difficult to resolve because the area in which these offences occur are not easily accessible, most of them being in the mountain areas. To a certain extent this also explains why there is a backlog in some of the cases that need prosecution.

In addition, the High Court has appellate jurisdiction on decisions given by any Magistrate Court with respect to any civil or criminal proceedings. Such appeal is of right unlike the cases from the Judicial Commissioners' Court where

appeal is on a Certificate issued by a Judicial Commissioner. Even appeals from the Third Class Magistrates' Courts come to the High Court in a similar manner - as of right. As expressed by Judge Molai:

You don't have to apply for a certificate if you are not satisfied with the conviction or sentence [of a Magistrate Court] or both. You can appeal (Molai: 6.3.1987).

As an appellate court, the High Court has power to vary and reverse all judgements, decisions or orders made by any Magistrate Court in civil or criminal proceedings through various courses of action. One is that a new trial may be ordered with a directive, where necessary, that such new trial be heard in the High Court. Alternatively, it may send a case back to be heard and decided in a Magistrate Court; with such instructions as deemed necessary.¹⁸ In these matters if appeal subsequently becomes necessary, it lies to the Court of Appeal, not as of right, but with leave from the Judge concerned. As pointed out by Judge Molai:

If I feel there is something which needs to be straightened out by the Court of Appeal [leave is granted]. But if I feel you are trying to waste the Court of Appeal's time and there's no prospect of success, I can say I don't allow it. But if you're not satisfied with my answer, you are entitled to approach the Court of Appeal and apply that you be allowed to take appeal against my decision of "NO". The same thing would apply to the Court of the Judicial Commissioners.¹⁹ (Molai: 6.3. 1987).

The Director of Public Prosecutions indicated that most appeals before the High Court arise out of criminal cases in matters of stock-theft, assault (G.B.H) and culpable

homicide. Since these appeals are just arguments out of cases tried before the Magistrates Courts, the Law Office does not lead evidence.

Under its unlimited jurisdiction, the High Court has the prerogative to sentence a man to death or a term of imprisonment of any length or to impose any other sentence. Even its Civil jurisdiction, with regard to what order or award for damages may be issued, is just as unlimited. Judge Molai, for example said:

If you want to sue a man for a million (maluti) or 10 you can bring it here, and we'll see what we can award you (Molai: 6.3.1987).

In a further statement, Judge Molai said the High Court's decision is not limited by anything. He added, "where we sat as a court of first instance, the appeal lies to the Court of Appeal as of right, you just go to the Registrar and lodge an appeal".

There is only one High Court and this is situated in Maseru, the Capital. Palmer and Poulter(1972) however, point out that the High Court may sit elsewhere if the Chief Justice so decides but as they observe, this provision is never exercised. The Attorney General expressed the view that the received law courts are too few in number, considering the caseloads they have to deal with; many of which as he pointed out are still outstanding. He suggested the need for establishment of more "High Courts",²⁰ since in his conviction:

The main problem is not with the jurisdiction of various courts as such, that is, in terms of what type of cases

the various courts can handle, it is because the cases themselves are too many (Maope 16.2.1987).

However, the Attorney General accepted that the High Court in particular is overburdened, and that this arises primarily as a result of its overall unlimited jurisdiction, in accordance with which it can even prohibit the lower courts from taking on certain cases, while those over which it has jurisdiction are already too many. He pointed out that at the moment the High Court is greatly assisted by the lower courts²¹ in relieving itself of the caseloads.

Finally, it should be noted that the High Court possesses review powers over decisions of the Magistrates Courts. For instance, in the event whereby the sentences given are in excess of the jurisdiction of the Magistrate of the particular class, its confirmation by the High Court is required. This forms the other bulk of the work of the High Court judges and thus adds to the point raised above that the work is too much to be coped with by a single-handed court as further indicated below.

In his report for the year 1986;²² the Acting Chief Justice admitted that the High Court cannot cope with the amount of work, and that being only three²³ the judges of the High Court are presently overworked and as a result have little time to do proper research before writing their judgements. He suggested that the appointment of Acting Justice Lehohla²⁴ on permanent basis would bring immediate relief from the pressure of work in the High Court. The report further suggested that if the policy of government is

to take services to the people, there is urgent need to undertaken a feasibility study on the need for the establishment of circuit courts, as the practice of bringing many witnesses to Maseru for long periods is also consistently giving rise to a series of problems and disadvantages. First, the issue of the subsistence allowances received by witnesses, was raised. The allowances are held unrealistic since they do not take into account the cost of living. In addition, it was mentioned that there is no proper accommodation for these witnesses and the concrete floors on which they have to spend the nights are regarded to be a punishment, especially during the cold winter months.

Reference was made to the High Court statistics of cases filed and disposed of in 1986 in comparison with those of 1985.²⁵ The figures show an increase of 257 cases from a total of 1,570 cases filed in 1985; to 1,827 in 1986. The number of cases disposed of in 1986 was 821 as compared to 799 cases in 1985. The number of automatic reviews on decision of the Magistrates' Courts rose from 629 cases in 1985, to 727 in 1986. These represented substantial increases despite the fact that for a greater part of the year there were fewer judges in office than was the position in 1985, thus more work was done in 1986. It would be interesting to carryout a survey of how these figures compare with those of cases dealt with in the Magistrates Courts and the Customary Courts.

Finally, it is important to point out that the High

Court is a superior court of record, and thus has inherent authority to fine and imprison for contempt of its authority. It also cannot be directed by orders of mandamus and prohibition; nor can it be called for review. The point that the High Court is a superior court of record was reiterated on several occasions during the observations of its proceedings. The nature of the issues that arose from this shall be dealt with in full later on when discussing how the received law courts work in practice.

THE COURT OF APPEAL

Following the suspension of the 1966 Independence Constitution, the Court of Appeal came to be reconstituted in accordance with the Court of Appeal Order No. 17 of 1970. Now this court is governed in accordance with the Court of Appeal Act of 1978.

Prior to Independence, Lesotho shared a common Court of Appeal with Botswana and Swaziland, which was first established in 1954. Before then appeals went direct from the High Court, or its predecessor, the Resident Commissioner's Court, to the Privy Council.²⁶ Crawford (1969) points out that it had been difficult for the Botswana, Lesotho and Swaziland to support their own, or even a common court of appeal on the lines of the East or West African States. At Independence, Lesotho established a separate court although the personnel of this court is still shared to a large extent with Botswana and Swaziland.

The Court of Appeal has appellate jurisdiction as of

right in respect of among other things; final decisions from the High Court in any civil or criminal proceedings, arising from questions such as those relating to the enforcement of the fundamental human rights and freedoms; the rights of persons whose property is compulsorily acquired; final decisions in proceedings for dissolution or nullity of marriage, etc. It also has limited original jurisdiction on questions relating to succession to the throne and the regency. Decisions made under the latter are not subject to Appeal.

The decisions of the Court of Appeal are binding to all, and it alone can reverse them. As indicated by Judge Molai:

The Court of Appeal, and not the High Court nor the Judicial Commissioner's Court, is rightly the last tribunal of the land. Therefore, once it has taken a decision; you've got no right anywhere. So their word is more difficult [to reverse] than ours²⁷ (Molai: 6.3.87).

The above completes the description of the organisation and jurisdiction of the received law courts. What is obvious is that the structure represents a much more complicated system in which even the jurisdiction in terms of the kinds of matters to handle and sentencing are clearly distinct and allocated relative to rank of each individual authority in the structure. All these are guided by written rules, but it is when rules of procedure and evidence, as described below, are taken into account, that these courts emerge as even a more complex structure, much more distant in character from the courts considered in the last two chapters.

THE RECEIVED LAW COURTS AND EMPHASIS ON RULES.

One fact evident is that such extensive and elaborate rules setting out technicalities of procedure and evidence as those employed in the received law courts, are absent in the customary courts, and more so in the "unofficial" Chiefs' Courts. The descriptions in the following sections are not exhaustive of all the principles along which proceedings in the received law courts ought to be conducted, but they do embody the elementary characteristics of the rules employed. The main issue here is that the rules of procedure and evidence are far more complicated and "formalistic", and they reflect the characteristics of the adversarial approach more than is in the customary courts.

One major point to be reckoned with is that in the received law courts, civil procedure is very distinct from criminal procedure. In civil proceedings, the rules and statutes govern the process of bringing matters before the courts and how to deal with them once that has been achieved. These rules set out in detail and set time limits within which each stage in the process has to be accomplished. Other rules specify requirements of what should be done, for instance, about ways of bringing necessary action; what papers to file and in what format, order and so on. There are rules governing proceedings in the High Court and those governing procedure in the Magistrates' Courts as limited by statutes.²⁸ In the case of the Court of Appeal there is the 1980 version of the rules²⁹ to govern proceedings before it.

The rules state the various ways of instituting civil

proceedings namely, that it can be by application or alternatively by action. In the former, the parties consist of the applicant who is the complainant seeking relief and who brings the application, and on the other hand, is the respondent who defends himself against the applicant. In action proceedings there is first the plaintiff who is the complainant who seeks relief and asks for a remedy by issuing summons, and on the other side, is the defendant who defends himself against the plaintiff's action. These aspects are important as they ultimately determine what relevant papers are to be drafted. Furthermore, the rules specify variations in the event whereby the complainant chooses to institute proceedings by application. First, this can be done ex parte and, secondly on motion. In each case it is spelt out as to what papers to file: founding affidavits, and replying affidavits; as well as the time lapse allowed in each stage. The court has the discretionary powers to allow further affidavits, again within specific limits.

Other rules specify what should happen once the matter is before the court, such as those relating to pleadings: their functions, terms, forms. Likewise there are different rules for the High Court and for the Magistrates Courts. The types of summonses are also spelt out in the rules. It is also stated, for instance, that a declaration must be made and this should contain a statement of full particulars of a claim setting forth its nature, the conclusion of the law which the plaintiff is entitled to from the facts stated; and a prayer for the claimed relief. The plaintiff should

deliver a declaration within 14 days, after service upon him of entry of appearance;³⁰ a further illustration to the effect that each stage should be accomplished within specific time limits.

In criminal proceedings similarly, there are always 2 parties. On the one hand is the prosecutor, prosecution or complainant, and on the other hand there is the accused or defendant, who may be represented by a private counsel. All criminal proceedings are nominally at the suit of the Crown, but the proceedings are in his name only when they are brought by his law officers, namely the Attorney General, the Director of Public Prosecution and their staff. This, as stated by the Director of Public Prosecutions, is in almost all the cases. He indicated as follows:

I can't think of any reason why [we can decline to prosecute]. But I'd say in most instances we take cases to court; we never decline to prosecute (Peete: 30.1.1987).

There is, however, provision for private prosecutions in which an individual member of the public may institute criminal proceedings against the perpetrator of a criminal offence, whether or not he is directly aggrieved thereby. This would include such persons as a husband, legal guardian, a wife or children of a deceased person (PART III of the Criminal Procedure and Evidence Act of 1981). Taking into consideration the statement of the Director of Public Prosecutions quoted earlier, matters of private prosecution are, however, extremely rare. This evidence contrasts sharply with what happens first, in civil proceedings whereby

most cases are in fact matters of private litigation; the state, as Crown Counsel Ntsonyana stated, only coming into the picture where the suit is against the Government. Secondly, it contrasts with the position in the customary courts where proceedings, both civil and criminal, are brought to court by individuals on their own behalf.³³

Generally speaking, criminal proceedings may be brought at any point, without any limitation as to time. Much depending, of course, on the police investigations and findings, except where there is a prescription that prosecution may be barred by lapse of time. As described earlier, investigation for certain types of offences such as stock-theft, murder; including ritual murder, are difficult to conclude to enable the prosecution to proceed with its duties. But as one Magistrate³⁴ disclosed in my discussions with him, sometimes the process of justice is delayed because the police neglect their duties unduly. To demonstrate this he referred to an incidence in one district in which he in person ordered for the release of several people who had long been remanded in custody while awaiting trial.³⁵ This Magistrate further pointed out that such avoidance of duty on the part of the police is very common. As a result, many people stay in remand for long periods of time pending investigations. This occurs despite the provision that people are to be brought to trial without undue delay (PART X (A) of the Criminal Procedure and Evidence Act, 1981, Section 141). As shall be discussed more later, there is quite substantial evidence to the effect that several cases

are brought to trial on incomplete investigations thus causing further delays.

Criminal proceedings before the received law courts are regulated in terms of the Criminal Procedure and Evidence Act of 1981. Strictly speaking, some parts of the Act belong to the law of evidence rather than to criminal procedure, but the two appear to be so intimately bound with the work of the criminal courts, that it was perhaps viewed appropriate, to contain them under one legal instrument. It contains for instance, the jurisdiction of the Magistrates Courts (PART I); provision that prosecutions are at the public instance and set out the powers of the Director of Public Prosecutions (PART III); provision for offences which shall not be barred by any lapse of time such as murder (PART IV); provision relating to Preparatory Examination before the Magistrates Courts (PART VII) and so on. In addition, the Act contains elements pertaining to the law of evidence in criminal proceedings. Included here are such elements as those relating to securing the attendance of witnesses, duties of witnesses to remain in attendance, compelling witnesses to attend and give evidence, payment of expenses of witnesses, taking of evidence on commission, examination of witnesses by parties, Courts' powers to decide on competency, oaths and affirmations, admissibility of evidence and accomplices, sufficiency of evidence, documentary evidence, privileges of witnesses. Furthermore, it refers to special rules of evidence in particular criminal cases such as treason, perjury or subordination, incest, infanticide or concealment

of birth, counterfeit, receiving stolen goods and so on (PART XII).

The rules of evidence in both civil and criminal proceedings tend to be generally similar. For example, hearsay rules apply to both civil and criminal proceedings without distinction, and so do other principles laying out what constitutes acceptable and sufficient evidence and what does not. The hearsay rule simply means that if you don't hear it, see it, smell it or touch it yourself, you cannot testify about it (Cohen, 1961). The aim of this rule is to keep out unreliable testimony from being accepted in the trial - the whole idea being to ascertain the truth by examining a witness who has first-hand knowledge of the facts to which he is testifying. Wootton (1963), on the other hand, argues that the whole legal process of examination, cross-examination and re-examination can hardly be rated highly as an instrument for ascertaining the facts of past history. However, there are exceptions to the hearsay rule, and these are stated in the rules - they include certain documentary evidence such as copies of public documents, statements made by deceased persons and the like. There are in addition, principles relating to other exclusionary rules of evidence, relevance and admissibility, exception to the hearsay rule, admissions and confessions, the burden of proof and so on.

Furthermore, the rules of evidence set out the mechanisms of presenting evidence to the court. They deal with the circumstances in which the court may receive

evidence given before the trial, principles governing the order of calling witnesses, taking the oath, examination in chief, cross-examination, re-examination, impeachment of credit of witnesses, the admissibility of evidence tendered out of its proper time, and so on. The rules of evidence are held to be justified only, and in so far, as they assist the court to reach a just determination in the matter upon which it has to adjudicate.

The above is just a sample of rules of evidence and procedure in the received law courts. Their main characteristic nature is that they originate from the principles of the adversarial model of trial. which, as mentioned before, was introduced during the period when Lesotho was under British rule. This factor becomes a crucial element in understanding how the received law courts system functions in practice as shall be described later. First aspects of the link between the received law courts and the adversarial system are addressed.

THE RECEIVED LAW COURTS AND THEIR RELATION TO THE ADVERSARIAL SYSTEM

The work of Packer (1968) has been selected to provide a frame of reference in the attempt to demonstrate the link the received law courts have to the adversarial model. This work has been found to be most appropriate in this regard, as it best spells out the fundamental elements of this model. The argument put forward at this point is that the rules that ought to govern proceedings before the

received law courts, reflect elements of adversarial systems. The argument is extended further later, to show that at the practical level, however, these courts present a somewhat different picture from what the adversarial principles prescribe.

For a moment we deal with descriptions indicating that the rules of the received law courts reveal features of the adversarial model or what Packer (1968) has termed the Due Process Model. Then we proceed in the next section to demonstrate common practices in the world of reality of these courts, which as to be argued reflect the fact that these are western courts in a non-western setting, and as such the patterns of behaviour found in them are different from those that have been argued to prevail in the western countries. The Due Process Model in this context is used to provide details about how the system of the received law courts is designed to operate, as against what really happens in practice. The prescriptions about the rules of evidence and procedure described here, have earlier been argued to set the received law courts system even further apart from the customary courts and the "unofficial" Chiefs' courts in terms of ideology. The descriptions in this section are intended to built-up a background against which the functioning of these courts will later be judged.

As Packer (1968) acknowledges, the prescriptions of the Due Process Model which he speaks of only refer to constitutional and statutory provisions about how the process ought to operate, and do not reflect nor say anything about

what subsequent patterns of behaviour become; or some important problems that the system encounters in the real-life world of the process. His analysis deals with value choices of conduct which are of priority to the model, merely affording a convenient way to talk about the operation of the process whose day-to-day functioning involves a constant series of minute adjustments, depending on the demands and claims the system is confronted with. The Due Process Model is underlined by a complex of values, whose components are demonstrably present in the preferences made by those who operate it.

Among the complex assumptions embraced by this model, Packer (1968) speaks of: "the adversary System"; "procedural due process"; "notice and opportunity to be heard"; and "day in court". All these are noted to contain the notion that the alleged criminal is not merely an object to be acted upon, but an independent entity who may, if he so desires, force the operators of the process to demonstrate to an independent authority, that he is guilty as charged. Through this, the model permits, but does not require the accused, acting by himself or through a counsel to play an active role in the process. By virtue of this prescription the process becomes or has the potential to become a contest between, if not equals, at least independent actors.

The other principles underlying this model refer to stronger or weaker notions of how this contest is to be arranged, in what cases it is to be played, and by what rules. For instance, the presumption of innocence as Packer

(1968) indicates is a normative and legal principle which sets the direction of how the officials are to proceed. But the adversary aspect is the one which is very central and it is embedded in the other presumptions upon which the model is founded.

In its overall outlook the Due Process Model is presented as an obstacle course with each of its successive stages designed to present impediments to carrying any further along the process. Its ideology is far more deeply impressed on the formal structure of the law, whose accurate strands though, are strangely difficult to trace, so that only its approximation is possible (Packer, 1968). In a similar manner, Baldwin and McConville (1981) have pointed to the English adversarial system's emphasis upon formal, combative trial proceedings in open court, with a jury acting as an independent adjudicator of guilt and innocence and the judge ruling on questions of law and ensuring that procedural rules are followed.

It is in this sense that Jacob and Wheatcroft (1966) also observe that the court in this context, is supposed to act as an umpire and to see to it that the parties play the game of litigation according to rules and at the end to give an answer to the question of who the winning party is. Principles such as those raised by Lord Denning in the case of *Jones v National Coal Board* (Court of Appeal, 1957) only serve to reinforce the above. For instance, Lord Denning emphasised that the judge does not have to investigate the facts, he is not an inquisitor but sits to hear and determine

issues raised by the parties and not to conduct an investigation or examination on their behalf or of society at large. The judge only asks questions when it is necessary to clear up any point that has been overlooked or left unclear.

As an illustration, Section 13 of the High Court Act No. 5 of 1978 (of Lesotho) can be seen as having the same intentions. The provision prescribes that pleadings and proceedings in these courts shall be in the open, save as otherwise provided in the Act, or as a judge may find it necessary to exclude any individual or class of persons from the proceedings. However, in the absence of a jury in the case of Lesotho, the judge is left to perform all the roles.

He becomes the sole controller of the proceedings with the duty to ensure that the rules are followed, also he decides on admissibility of evidence and its evaluation. In addition, he has the duty to give judgement. Thus he decides on questions of law and determines the guilt or innocence of persons concerned as well.

Due process rejects the reliability of fact-finding processes which place heavy reliance on the ability of investigative and prosecutorial officers, acting in an informal setting in which their distinctive skills are given full sway, to elicit and reconstruct an accurate account of what actually took place in an alleged event. In its place it substitutes a fact-finding process that stresses the possibility of error, which takes into consideration the fact that people are poor observers of disturbing events, in

particular. In this several factors are brought to bear. It is reckoned that the greater emotion-arousing an incident is, the greater the possibility that recollection will be incorrect. In addition, the possibilities that confessions and admissions may be physically and psychological induced while in police custody, are all taken into account. Hence the insistence on formal, adjudicative, adversary fact-finding processes in which the factual case against the accused is publicly heard by an impartial tribunal, with the evaluation following only after the accused has had a full opportunity to defend himself. The scrutiny of facts can continue for as long as there is an allegation of factual error that has not received adjudicative hearing. Thus in this context, insistence is placed on prevention and elimination of mistakes to an extent possible, and short-cuts around that principle are rejected. This is where the aim to protect the factually innocent as much as to convict the factually guilty comes in.

The above leads to a further crucial value as far as the model is concerned. This can be expressed in the concept of the primacy of the individual and the complementary concept of limitation of official power. The combination of stigma and loss of liberty which the latter has power to afflict, in addition to being coercive, restricting and demanding, are viewed as the heaviest deprivations to ever be permitted to operate without checks and control. It is reckoned that this can be achieved through the doctrine of legal guilt, according to which one cannot be held guilty on probabilities

based upon reliable factual evidence alone, instead his guilt can be held if, and only if, these factual determinations are made in a procedurally regular fashion, and by authorities acting within competences duly allocated to them. The main concern is that the rules designed to safeguard the integrity of the process, should be given effect. The convicting court must possess rightful jurisdiction both in terms of venue and power to deal with the kind of case; the case must be committed before too long an elapse of time, and the person concerned must fall within the category of persons who can rightfully be sued or not legally immune from conviction, whatever the case might be. Any adequate competence of effecting these factual determinations depends on the tribunal's awareness about them and its willingness to apply them.

The above requirements have nothing to do with factual issues whether the person concerned is liable for the conduct in question, but rather are connected to the concept of legal guilt which in turn relies on the doctrine of the presumption of innocence. The latter simply means the guilt is yet to be determined by legal doctrines that serve to limit official power through certain substantive and procedural regularities. Hence in this manner the state is forced to prove its case in an adjudicative context, thus bringing into play, all qualifying and disabling doctrines that limit the use of sanctions against an individual, while enhancing his opportunity to secure a favourable outcome. What Cohen (1961) points out is that in a criminal case, the prosecutor

must convince the court of the defendants' guilt "beyond reasonable doubt", while in civil proceedings the plaintiff and his representative must sustain the "preponderance of evidence" in order to be awarded damages on the basis of facts revealed to the court. The vital difference between the trial of a criminal case and that of a civil case as Gair (1961) notes, lies in the nature of the burden of proof that is required of the adversaries, in the manner shown above. The presumption of innocence opens up a procedural situation that permits the successful assertion of defences, having nothing to do with factual guilt. In that sense, it upholds the proposition that the factually guilty may be legally innocent, and should under the circumstances be given the benefit of such factor. The doctrine of legal innocence is viewed as the appropriate chance for the process to correct its own abuses, and putting pressure to induce conformity with the set standards.

One final complex of attitudes underlying this model is the idea of equality. The ideal of equality holds that "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has".³⁶ The most outstanding factual predicament underlying this assertion, is acknowledgement of noting the gross inequalities in the financial resources of defendants in the adversary system, and also that as a consequence large proportions of defendants are denied defence by virtue of their lack of means to acquire services of a lawyer. Issues connected to the legal representation of parties in the received law

courts are left until the next chapter.

The thrust so far has been that the requirements of the rules of procedure and evidence in the received law courts reflect the ideology and doctrines that underlie the adversarial model, whose features have just been described.

Further requirements such as those relating to the role of the judge to see to it that legal counsel behave themselves and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; as well as to ensure by wise intervention that he follows the points that the counsel are making and that he can assess their worth (Lord Denning, 1957), serve as elaborations of what has been stated already, about the character of the model. Similar strands were mentioned during some of the interviews conducted while on field research. For example, Crown Counsel Ntsonyana explained how the judge has to ensure that the atmosphere of the trial is proper. She mentioned that, for instance, the judge has got to protect people from the "ridiculing" and "harassment" by the counsel, which she said occurs mainly during cross-examination. In a similar manner, the Chief Magistrate stated that the judge has the duty to protect individuals from "harassment" by lawyers.

Furthermore, are requirements pertaining to the powers of the court to call witnesses in certain cases and in accordance with other legal specifications (JUSTICE, 1965); about allowing objections only on grounds that testimony is immaterial, irrelevant, incomplete, hearsay, or possibly not responsive; and the role of the prosecutor to construct or

build a case through the evaluation of all facts and circumstances which can possibly illuminate the incident; and of the counsel to tear-down, pick apart, rip-holes in the finished product of the prosecutor (Cohen, 1961). All these serve to reinforce the idea that this model is adversary, and very much like an obstacle course consisting of successive stages of fact-finding, which Bloom-Cooper (1963) equates to pieces of a puzzle, each of which is fitted into a framework which is delineated by the nature of trial - an accusation on a specific charge; against a specific person, with all else excluded. The rapier of the prosecution, Bloom-Cooper (1963) further argues, is to thrust out; the defence's task on the other hand is to parry it, with no concern other than that the prosecution's should not strike home. In his conviction, the constriction of the English system of trial does mean that the rule of the game are well defined and that an accused can prepare himself for it.

HOW THE RECEIVED LAW COURTS OPERATE.

Having considered the organisation and the model upon which the received law courts system is founded, we now proceed to examine the operation of these courts at the practical level. The descriptions so far have concerned themselves mainly with the ideal form, and have nothing to do, as mentioned once before, with what finally happens at the operational level or about the constraints which may be encountered.

In the west, from where the ideology of due process has

originated, many studies examining how the adversarial modelled courts work in practice have been performed, and their findings point in one direction that the adversarial model does not work in practice. Generally speaking, these studies have focused on the point that there is a gap between the law in books and the law in action, although various studies have taken different starting points from which the "gap" between the rhetoric of the law as reflected in the adversarial model and its practice is presumed to originate.

Several of these studies have been selected to demonstrate the main trends in their findings. Starting with Carlen (1976) for instance, the gap between the rhetoric and practice is traced to the emergence of "informal rules" which she argues are produced by negotiatory practices of court actors who are structurally invested with power. Among these she includes the magistrates, lawyers, police and probation officers. These Officials, as she points out, operate the system in a manner that specifically excludes the defendant, particularly the unrepresented one, from the proceedings. She suggests that in this way, the notion of the "Rule of law" is thus not achieved in practice; and that the "informal rules" of the above participants serve to maintain the inequalities of a capitalist society by coercion.

By contrast to the emphasis on "informal rules", McBarnett (1981) argues that the gap between the rhetoric of law and its practice, is not only due to informal rules originating in the day-to-day negotiatory procedures of the

court-room, but instead can be explained by reference to the form and content of the law itself. In this she points, among other things, at the police procedures following the apprehension of a suspect; the prosecution system; and the rules of procedure and evidence; which she argues are all designed to secure conviction. This according to her, contradicts the rhetorical claim of due process, that an individual suspect is presumed innocent until proven guilty.

The works of Blumberg (1967; 1969) which were forerunners to the above two, start the argument from a different angle. For example, Blumberg (1969) begins by pointing out that sociological analyses in trying to provide explanations of how the adversarial model functions, have tended to ignore the important variable of the organisation of the court, yet it is a priority that exerts a higher claim in the operations of the courts, than the stated ideological goals of "due process of law". The latter, he claimed is often inconsistent with organisational goals. He noted that such organisational goals as discipline and strive for order, for example, impose a set of demands and practices on various personnel, in the course of which commitments to the ideology of due process and professional service to the client are abandoned. Similar expositions to the ones cited here are to be found in other works as well, although as mentioned earlier, the variables focused upon vary from one study to another.

With the resemblance the received law courts have been shown to share with the western courts, the basic presumption

one could make is that it would as well be possible to arrive at parallel comparisons as far as their practices are concerned. That is, one would expect to find practices similar to those identified as common manifestations in the operations of the western courts, so that similar conclusions such as those postulated in the works above and others,³⁷ would also be applicable in the case of the received law courts. This presumption, of course, underlay my thinking about how the received law courts operate when I went into the field for data collection.

While the above works serve as a ground from which to start in unravelling how the received law courts function, by virtue of the fact that the latter also have their basis in the adversarial model, their findings cannot be used without qualification and without obscuring issues which seem to be of fundamental importance and of utmost relevance in this context. The most crucial point to remember is again that we are dealing with legal institutions equivalent to what Abel (1979) referred to as "western courts in non-western settings". Thus it is important in seeking explanations and making descriptions about what goes on in these courts, to bear this in mind in addition to the theoretical, ideological and technical properties they share with the western courts. Furthermore, consideration should be given to peculiar circumstances given rise to by this factor, as they contribute highly to the manner in which the adversarial model performs in this case. The descriptions that follow indicate that the situation at the practical level of the

received law courts is much more complex, marked by an interaction and interplay of a multiplicity of factors and constraints which together exert influence on their practices.

The intention is to demonstrate from the data obtained during the field research that the above studies, with their stress on the development of informal rules and manipulation of formal ones, may not be adequate in explaining what happens in the received law courts. In this case, it is not simply a question of informal rules displacing the formal ones, rather the main issue is that the adversarial model in this context is on the whole "foreign", working under certain constraints and in conjunction with "customary"³⁸ processes in the midst of which completely different kinds of behaviour patterns from those observed in the western settings are produced. In other words, the system in this case does not work for other reasons than simply because of the gap between the rhetoric and practice. Thus to be applicable, the findings of these studies would need to be redefined in the light of the circumstantial reality and constraints confronting the practice of due process in this context. The literature from the west falls short of capturing and bringing to the forefront the kind of practices that appear dominant here.

In giving the descriptions of how the received law courts structure works in practice, I would like to begin from a point which was raised several times in interviews conducted during the field research. What was repeatedly

stressed is that, there is a difference between the customary courts and the received law courts in terms of their approach to dispute settlement. Additionally, it was also mentioned that the two systems employ different rules of evidence and procedure. In this the informants, seemed to imply that the recognition of this difference should form the centrepiece in an effort to explain and to promote a better understanding of what goes on in the received law courts. In other words, any exercise aimed at describing the conduct and practices in the received law courts should also start from the same stance.

Furthermore, what seemed to be suggested is that the differences in approach and rules of procedure and evidence between the customary courts and the "unofficial" chiefs' courts on the one hand, and the received courts on the other, is a major determining factor underlying the manner in which the latter set of courts operate; and about how the adversarial rules are employed in practice. Put in another way, the contention here is that with the realisation of the dissimilarities among the various court structures, means that many aspects of the adversarial system merit careful consideration within the context of the received courts and their practice. The reasons for this contention are demonstrated in the following sections.

The most outstanding dilemma to be reckoned with as pointed out by the Acting Chief Justice is that, the Basotho people generally do not understand the nature of proceedings in the "formal"³⁹ courts. As he further explained, even

those who are a bit enlightened about the rules used in these courts, only have a superficial knowledge of them. This point was reiterated by the Attorney General who said:

The procedures, all of them in various courts puzzle "li tsietsa" the people (Maope: 16.2.1987).

In a further explanation, the Attorney General similarly made it clear that he was specifically speaking of the received law courts, although as he mentioned to some degree the same could be said of the customary courts, in which attempt has been made to move towards adversarial procedure. However, as already discussed elsewhere, in practice the adversarial procedure seems to have had minimal effect on the practice of the customary courts. The explanations offered by other informants made similar suggestions, but proceeded to point out that the rules in the received law courts are "foreign" and that the customary law procedures and rules of evidence, are better understood, because they are embedded in the culture of the Basotho and intrinsically different from those of the adversarial approach, with its intensive emphasis upon the English modes of trial.

The point about the people's ignorance of the rules of procedure and evidence and what goes on in the courtroom has been raised in such works as those by Carlen (1976), but in the present work the argument is that it is not only ignorance about the rules but as shall be demonstrated, the real issue is that the rules in the received law courts are alien and have different cultural context from those in the customary law, but even more, there is no conceptual

knowledge and sufficient equipment to cope with them as the examples discussed in the following sections reveal. What seems to complicate issues more in this case is the people's knowledge of something else - "customary law" processes - which they often carry into processes of the received law as well, expecting that the two work in a similar manner.

The Chief Magistrate categorically stated that "indeed the people are baffled" by the rules of procedure and evidence used in the received law courts. In the same context Resident Magistrate Mohale concluded that "in actual fact these courts [received law courts] are not the [Basotho] people's courts", in that the procedures and rules of evidence they adopt are too complicated and the people generally are not familiar with them. What is contended is that it is not simply that people do not understand the received law rules, but also that such rules have different cultural foundation unknown to the Basotho. This was confirmed in the explanation by Judge Molai, noting that the received law courts' procedure is removed from that which the people are accustomed within the village setting, that is, in the "unofficial" chiefs' courts and in the customary courts too. Pointing to one aspect of procedure in the received law courts he stated:

We start swearing people by God, but we don't even ask them whether they are Christians and whether by swearing by God they are bound to tell the truth, I don't know (Molai: 4.3.1987).

The above statement shows one of the technicalities vital to the received law procedure and yet is absent in the customary

courts.⁴⁰ Finally, Magistrate Nkhereanye intimated that, he is totally dissatisfied with the courts and the whole administration of justice including the structure of the judicial system, the procedures and rules of evidence, because as he expressed it, the new procedures cannot be applied or are unenforceable. The meaning of this statement becomes clearer as difficulties encountered in the use of the adversarial rules are discussed.

The exclamation of the presiding Magistrate in CO/9/MCQ/MM/8.6.87 that

You see, these procedures of the English people! They annoy me "Li'a ntena". Now you're simply protecting your child instead of stating the facts of your case.

goes to illustrate the extent of frustrations experienced in the application of the adversarial rules. In this case the court was sitting as a "Children's Court" in terms of the Children's Protection Act of 1981. This statement was directed to the mother of the boy who was before the court for use of abusive language - "insulting an elderly man". The mother, instead of assisting the son to cross-examine the complainant, largely made statements which indicated she was on the side of the boy. The magistrate several times pointed out that he could not get where the woman's questions were leading, as they were not useful to her claim that the boy did not insult the complainant. The boy was consequently asked to carry out the cross-examining on his own behalf. This example demonstrates the nature of complications that arise in cases where parties are not

legally represented.

The above example does illustrate the point made earlier, about the general lack of understanding of the rules made use of in the received law courts, and it does sustain the point by Magistrate Nkhereanye that the rules are difficult to apply. In this case the woman could not realize that in cross-examination she ought to substantiate her claim that her son had not abused the complainant. Also, the statement of the magistrate as cited above, demonstrates the point made earlier, about extreme consciousness that the received law courts are not indigenous to the Basotho, the implication being that hence their rules are problematic to enforce. Further examples of the same kind are provided further on; and as shall be indicated the problems in handling the rules are not only peculiar to the members of the general public, but are experienced by the court personnel as well.

In demonstrating that the people do not understand the rules governing proceedings in the received law courts, the Attorney General stated:

The person who is suing ought to produce evidence and so does the defendant. A lot of people fail to do this, basically because they have no understanding of what evidence is and how it is to be obtained. Because of their lack of knowledge of the law, they don't know what evidence is (Maope: 16.2.1987).

What seemed to be most disturbing is when the Attorney General mentioned that, in the circumstances a number of people decide not to bring cases including criminal offences

to the courts of law, simply because they cannot handle the procedures required. As the Attorney General further argued, not being used to exclusionary rules of evidence under the customary law of procedure, the people do not know what constitutes relevant and acceptable forms of evidence within the rules. This causes further predicaments which manifests themselves in the course of courtroom proceedings.

Sometimes there is a tendency to exclude or overlook certain important elements of evidence when presenting and adducing evidence to the court. For example, in CO/3/HC/JM/12.2.87, the judge raised a question about the law under which the marriage for which divorce proceedings had been instituted had been solemnised, as it was not stated in the papers before the court. In response the counsel for the applicant stated that it was a civil marriage. In this context this factor constituted a valuable and relevant element of evidence because it determined whether or not, the High Court had jurisdiction to hear the matter. In the event whereby it could have been a customary marriage, which was a possibility, the customary courts would have been the proper choice of forum.

A problem of the same kind surfaced in CO/6/HC/JK/9.3.87. (divorce proceedings). The applicant in the matter (wife), claimed that she had proof of adultery between her husband and the woman ("concubine") he was now staying with.

But she went on to state that the two were in no position to produce any children, because in her explanation, the woman was too old. The judge warned that the latter point in the

evidence was an overstatement of facts, as the plaintiff had no proof that the woman could not bear children any longer due to her age. The judge said:

You cannot say that in absolute terms. You are no expert [medical doctor] in such matters. You can only indicate your strong suspicions concerning adultery between the two, but your claim about children cannot be held to be an actual fact.

This points to the lack of knowledge about what to include or exclude from the evidence adduced on the principle that it cannot be accepted as valid for a judicial decision. To the ordinary person choices about what constitutes acceptable evidence are not too obvious. Again, the main issue here is that such kind of testimony would not have raised query in the customary courts or the "unofficial" courts, where people are allowed to state whatever facts they think necessary. It is not suggested, however, that such testimony would have been accepted but rather, that it would simply be ignored as an overstatement of facts.

In CO/83/HC/JK/ 9.3.87, the plaintiff had been hit by a vehicle and had in consequence suffered injuries. The plaintiff was suing for costs and he had submitted a medical report being proof of the injuries sustained and a receipt⁴¹ for medical fees showing an amount of M40.00. The claim the plaintiff was submitting amounted to M10,000 in respect of the injuries and costs of the proceedings plus the M40 Medical fees. The judge said the medical report showed that injuries caused were only temporary and not permanent. The implication was that the claim of M10,000 was too high for

the kind of damage suffered. The plaintiff appreciated the explanation, which he showed by thanking the judge. By this time the counsel for the plaintiff appeared highly amused - actually he laughed loudly. In this instance, it seemed the plaintiff was not properly informed that the claim had to be substantiated either by showing that the expenses incurred in terms of medical fees or the extent of the injuries justified the amount claimed. The plaintiff failed to sustain the "preponderance of evidence" (Gair, 1961) in order to be awarded damages at the scale requested. The facts presented to the court were held not to be sufficient and only M6,000 was awarded.

In CO/8/TC/MM3/24.3.87, a problem arose with regard to one of the counts in the charge. The accused was charged on 3 counts, first, culpable homicide; secondly, no licence and thirdly, "hit and run"; in which the accused knocked down a school girl with a vehicle killing her. As the prosecutor stood up and was already giving a summary of what the prosecution evidence would reveal, the magistrate asked him to elaborate on count (ii) of the charge - whether it referred to failure to produce a licence when required to; or that the accused did not possess a licence at all. At this point, the prosecutor appeared not to be sure of the facts. He, therefore, requested for an adjournment to allow him time to check on the facts of count (ii) and the relevant section of the Road Traffic Act No. 8 of 1981 which had been contravened. This is another instance in which a case was brought to the court without a full and clear or

comprehensive statement of the facts involved as required by the rules. Again while these may be the kind of inadequacies one finds in any court, the issue in this case is the extent to which this occurs in the proceedings.⁴² In addition, here it is not that the personnel want to manipulate the system rather such contraventions occur because of their inadequate grasp of how the rules ought to work. The fact is that most of the prosecutors in the Magistrates Courts have no legal training.

In an interview, Crown Counsel Ntsonyana raised a further point regarding the received law rules. Her main contention was that the method of leading people with questions as to what to say during the proceedings; and how to state the evidence, causes a series of difficulties. The first point in this is that, the rules determine what should be taken as constituting relevant and acceptable evidence, and how evidence should be given. As she put it:

... there are rules which prevent one from stating certain facts as part of evidence, for example, hearsay (Ntsonyana: 17.3.1987).

This point goes back to what the Attorney General, as mentioned earlier, stated that people are not familiar with such exclusionary rules of evidence as the hearsay rule, and some of the examples⁴³ already provided do demonstrate this point. An additional point is that such exclusionary rules do not operate in the customary courts and the "unofficial" chiefs' courts, and people tend to think the same applies in the received law courts as well. The second point Crown

Counsel Ntsonyana raised concerning the question-answer method of obtaining evidence in court is that, it tends to handicap the people mainly because, as she pointed out, "when you ask a question, I may respond in a manner I have understood it". In addition, she said she would personally prefer a method which would allow people to "speak out" telling their own version of the events from which a selection of relevant facts in a particular case would then be made. The issue about the kind of problems that crop-up during the proceedings as a result of the question and answer method, was also raised by the Chief Magistrate. In his explanation he stated that often what happens is that "when you ask a question, he [party/witness] thinks you should have asked a different one instead", in which event many people fail to give appropriate responses to the questions put to them.

The problem here as it emerged from the observed court proceedings is two-fold. First, the failure to cross-examine is greater whereby parties appear on their own, simply because ordinary people do not know nor possess the skills of the exercise. The fact that the proceedings are in English like in the High Court tends to make matters even more complicated. The next examples demonstrate the nature of the problem in detail. In CO/2/MCM/MM1/9.3.87, which was a Preparatory Examination on a charge of murder, the magistrate asked the accused: "how are your questions relevant to what you're charged with?" The following are the questions which the accused had so far put to the

witness: "'M'e [mother] do you know me? Where do I live? On the day in question ...whose field was being ploughed? Was it in the morning? What time was it? How many people were on the field?" It was only after the magistrate had directed the accused to address himself to the charge against him that the accused put questions which had a direct bearing to the charge which is: "When did the deceased arrive [on the field]?" and then, "since my arrival, had I shown any signs of being in a fighting mood?"

In CO/4/MCM/MM3/16.3.87, the accused (unrepresented) was reminded by the magistrate that he should not raise questions more than once. This is because on several occasions, the accused tended to repeat himself in cross-examination, but also as the magistrate at one point indicated, his (accused) questions were not "specific" and were "ambiguous". The underlined words were said in English, yet the proceedings had been in Sesotho. The point is whether the accused understood what the magistrate meant by them. In CO/15/MCM/MM4/1.4.87 too, the magistrate reminded a witness to be more specific and elaborate in her description about the place of the incident and not to assume that she (the magistrate) knew the place. Again in CO/11/MCM/MN1/1.4.87 several reminders that responses should be made more specific were made. The accused was unrepresented and he was charged with assault with intention to rape. In one instance the magistrate also made a reminder that the accused should not repeat his questions in cross-examining a witness. In an intervention by the prosecutor, the accused was told that he

could not cross-examine the witness on the facts she had not raised on her examination-in-chief. The accused was questioning the witness on the facts raised by another witness in the case. The prosecutor stated that the latter would answer for himself on those facts. Similar reminders about repeating questions, asking irrelevant or inappropriate questions, etc. were repeatedly made in other proceedings, especially in cases where the accused appeared unrepresented, which is a common phenomenon in proceedings before the Magistrates Courts, more so in criminal matters. This reaffirms the point which was made earlier on in which some of the informants alleged that the rules of procedure and evidence in these courts cannot be handled by laymen who possess no legal training. As indicated in the examples already discussed even the prosecutors in the Magistrates' Courts, all of whom (except a few) have no legal training, in many instances fail to abide by the provided rules.

The second dimension of the problem concerning the question-answer method as contained as stated by the Chief Magistrate and Crown Counsel Ntsonyana is that, the answers given to the questions raised in cross-examination, are usually not appropriate or fail to add any weight to the evidence already given; or put in another manner, they fail to inform the court better. But as observed from the courtroom proceedings, the problems also arise because the questions themselves are either wrongly constructed or ordered, so that it may not be clear as to what evidence they are seeking. The variety of problems involved here is shown

in the examples discussed next.

In CO/1/MCM/MN1/26.2.87 for instance, the accused first said he had no questions to put to the complainant. He was being charged for sexual assault. When the Magistrate asked whether he was in agreement with all that had been said of him, the accused responded in the negative; then proceeded to ask: "how was your assailant dressed?" The complainant gave the description. That was the only question that the accused ever asked and it was not even followed to any logical conclusion. Such questions, quite clearly, add no weight to the evidence the court already has. The response of one witness in CO/3/MCM/MM2/9.3.87 to the defence counsel's question: "how did you see the shoe of Accused 1?" that "because I have eyes", could have been similarly useless only that in a further explanation, the witness was able to substantiate it when the counsel later said: "yet a while ago you stated that you could not see!" to which the witness replied: "I said I could not remember, not I didn't see. The witness was able to state his facts in a logical manner, and thus undermining the counsel's attempt to confuse him - a technique which as described elsewhere is commonly employed by some of the legal practitioners. The witness referred to here was a University student and he appeared to have a good command of English and responded well to the defence counsel's questions.

In CO/3/HC/JM/12.2.87, a different kind of problem emerged. The applicant confused the children's birthdates.

In the evidence contained in the papers, one of the children

was said to have been born in 1969; but in testifying before the court, the applicant said it ought to have been 1970; because as she explained;

I know the date of birth [of the boy]
because 1970 was the year my husband was
released from detention.

Thus there was contradiction in the evidence presented to the court.

Failure to be specific about certain elements of the evidence appeared to be quite a common phenomenon. In CO/4/HC/JM/12.2.87, for example, in relating the events of the day in question, the plaintiff kept on using the reference "we"; for instance: "we were taken to the police station". It was only after the judge had asked for clarification on this, that it was stated that the plaintiff was "chained" (handcuffed) together with another boy and were being chased "driven" by men on horse-back. In CO/17/MCM/MN1/1.4.87, the magistrate asked the witness: "who did you say you were with?" The response was simply that: "I was with my mother". The magistrate then said: "should I write 'm'e' [mother] down here?" The witness then gave the name of her mother. In the same case, when the same witness was asked by the accused about what time the alleged offence had been committed, she responded: "It was in the evening 'shoalane'." The question was asked again and this time she said: "It was at night 'bosiu', but I had not yet gone to bed". The accused then asked as to which statement ought to be taken as stating the truth. To this, the witness replied that the two (evening and night) are the same, and when the

accused asked in what way they are similar, she said: "I don't know". It is such responses as this one which add no value to the evidence given to the court.

In CO/11/MCM/MM3/1.3.87, one of the prosecution witnesses was a member of the Lesotho Paramilitary Force, detective section. He was being led through the evidence regarding what action he took having received a report about some stolen property; to which he responded: "having got the report, I proceeded to Ha Tsosane" (name of a village). Then the magistrate intervened: "What does that mean?" This was followed by a question from the prosecutor: "Where [exactly] Ha Tsosane?" The witness then replied: "not knowing the place well ..." The prosecutor interrupted before the statement was even completed asking: "At whose place [home] Ha Tsosane [there]?"⁴⁴ But it was in CO/18/MCM/MM3/22.4.87 where it emerged clearly that such personnel as the policemen could also dismally fail to respond to questions put to them in cross-examination. Below is a brief statement of the encounter between the defence counsel and the police witness (Prosecution witness 9 [PW9]). This was a case on a charge of stock-theft. There were 10 accused persons, represented by two defence counsels separately.

Defence Counsel: Do you know this person? (referring to A10).⁴⁵

PW9 : (Silent, then mumbled something).

Defence Counsel: I have asked whether you know him (in an angry and loud voice). Then to Magistrate: Instruct this person to respond to questions, I haven't come here

to play. (To PW9): How come A10 has been charged on this count relating to EXHIBIT 1?

Later on PW9 was asked to show the court the papers which would substantiate his evidence, but he did not have them with him.

PW9 : There will be other policemen who will come and give evidence in that respect.

Defence Counsel: You're not responding to my question, why did you leave them [papers] behind? My questions are simple but you don't want to respond to them.

PW9 : Maybe I don't understand them.

Defence Counsel: (to Magistrate) "Ntate" [father] tell this person to respond to questions.

Magistrate : The question is, in your knowledge, how come this person (A10) has been charged on the count pertaining to EXHIBIT 1?

PW9 : I think ...

Defence Counsel: I don't want you're opinion. You don't know how this person has been charged on this count.

Then the prosecutor requested the magistrate to ask the defence counsel not to be angry in his cross-examination. The defence counsel finally remarked in astonishment, pointing out that PW9 had completely failed to respond to his questions despite his long service in the police force.

In the proceedings of the same case, because there were two defence counsels, the witnesses were cross-examined twice, sometimes on the same points. This seemed to confuse the witnesses. One of them actually refused to be cross-examined by the second counsel, until the Magistrate intervened.

Further indications showing people's lack of skills to carry out effective cross-examination were demonstrated in their tendency to ask more than one question at a time. These problems were sometimes coupled with the tendency of the people to narrate their evidence during cross-examination. In CO/6/TC/MM3/24.3.87, one of the prosecution witnesses (PW1) tended to fall into this trap several times and the prosecutor had to warn him: "Stop right there". At another instance it was the magistrate who told him not to narrate the facts of the evidence "Se ka qoqa litaba kaofela".

A further kind of observation common in the proceedings of the received law courts pertains to the exhibits, which often go missing especially in criminal cases. In CO/70/HC/JK/ 3.3.87 for instance, it was mentioned that one of the exhibits had gone missing. The weapon belonging to A2, had been confiscated but could no longer be found. In CO/104/ HC/JK/17.3.87 also, another exhibit being a navy handkerchief which had contained some money, had also gone missing. In CO/15/MCM/MM4/1.4.87, at one point the prosecutor requested for an adjournment to allow her time to look for the exhibits. The magistrate reminded her that it was her duty to see to it that exhibits are in court, even before the proceedings start. Then the prosecutor indicated that the exhibits had been brought to court on the previous day of the hearing, but that the police were now claiming that they could not be located. The court having been adjourned, I overheard two people conversing about the issue.

One pointed out how the court personnel were misappropriating various payment funds made through the courts; such as maintenance fees, and so on. He went on to intimate that the missing exhibits had possibly been exchanged or sold off for cash.

Furthermore, in CO/101/HC/JK/18.3.87 too, the defence counsel, pointed out that when the matter went on Preparatory Examination before the Magistrate's Court, some of the contents of EXHIBIT 1; being shells of the gun alleged to have been used in the killing by the two accused, did not include the "box" (now before the High Court), but only an envelope had been presented. The defence counsel was actually insinuating that the exhibits now brought to the High Court, could no longer be held as those on the basis of which the case had been referred to it in the first place, and thus could not be accepted. In CO/10/MCM/MM1/1.4.87, one of the witnesses, a policemen, having described the "molamu" (big stick) that had been used in the crime, revealed that the same had been misplaced; following his transfer to another duty police station.

Another common observed feature with regard to criminal proceedings pertained to medical reports submitted to the courts as evidence. For example, in CO/4/HC/JM/ 12.2.87, a long debate ensued concerning the medical report that had been presented to the court. The judge complained that in the first place, the photostat copies were not legible. In addition, it emerged from the explanation by the defence counsel that, the police had lost the original copy of the

said report. To this the judge pointed out:

The police ought to have been notified that the report was needed for purposes of proceedings in this Court (High Court); which is entitled to the best evidence.

Implicitly this statement was a reminder that the High Court is the highest court of record. The judge went on to show that the defence counsel should have pressed for a legible report, alternatively he ought to have ^bsubpoenaed the police to come and give evidence on the illegible report or refusal to release (provide) originals. What was even worse, it further emerged that the doctor involved in the case was not in attendance, though he had been summoned. Hence the judge indicated that the doctor should have also been subpoenaed and/or sent a warrant of apprehension to prison for contempt of court. In what sounded an angry voice, the judge stated:

Doctors have been requested to attend at their own convenience, but personally I have never endorsed that; therefore, I don't take it as a fact. It is stated that everyone has to appear [to testify] before the High Court and leave everything aside. This Court is entitled to the best evidence, therefore, best reports should be submitted.

When the defence counsel stated that he could not have subpoenaed all these people because the expenses involved would have been too high, the judge responded pointing out that justice could not be sacrificed because of money. A similar complaint was raised by the judge in CO/83/HC/JK/9.3.87, that the medical report was not legible.

The failure by medical practitioners to attend the proceedings surfaced more frequently than the few instances

mentioned above. In CO/107/HC/JM/18.3.87 for example, it was stated that the doctor was not able to attend because she was out of the country. In fact the crown counsel argued that the Director of Public Prosecutions being an officer of the law, could not mislead the court by giving false information concerning the availability of a witness whose evidence is so crucially needed. The judge on the other hand, raised a further issue in the matter that, it did not appear as if the doctor had testified at the Preparatory Examination (PE) either. This was questioned especially because despite the doctor's failure to testify at the PE, his report had been submitted in evidence. The judge claimed that procedurally that report could not be accepted for trial. As he put it:

It is not fair that the doctor was not called to be challenged at the PE. The report cannot be accepted as evidence in the trial, since the post mortem report has not been put to test. If he [the doctor] had been present at the PE, the picture of the case could possibly have been changed.

At this juncture it was mentioned that the concerned doctor had left the country for good. The question was then what could be done in the circumstances. The judge strongly held to the view that the report was not acceptable "without further facts", since there was no evidence either, that the statement of the doctor had been made under oath as required in terms of Section 27 of the Criminal Procedure and Evidence Act, which would render the report acceptable under the circumstances. At that point, the crown counsel made

indications that he wanted to abandon the case, and the defence counsel, in that event, proposed that he would put in an application for the accused to be discharged. The judge pointed out that it would first be necessary to look into whether the prosecution had been successful in establishing a prima facie case against the accused. Thus the mere fact that the doctor could not testify would not be sufficient to dismiss the case altogether. This factor, the defence counsel had overlooked as a matter of procedure - that it would be necessary to establish whether other evidence in the prosecution's case, was utterly useless - which would not require proof beyond reasonable doubt as would be the case under normal circumstances.

Similarly, in CO/17/MCM/MN1/1.4.87, the prosecutor stated that he had failed to get the doctor who had examined the complainant to come to court. The doctor according to the explanation had gone overseas till June. A request was made for the case to be remanded till a precise date could be arranged. In CO/10/MCM/MM1/1.4.87 too, it was mentioned that the Indian doctor who had performed the post mortem had since left the country.

Further complications revealed from the observations pertained to estimations as to time, place, weather and distances. Almost invariably, parties and witnesses had problems in responding to questions involving the above variables. In CO/11/MCM/MM3/1.4.87 for instance, when a witness (PW5) was asked to estimate the distance between her own home and the one that was burgled, she responded: It is

a distance from here to the end of that other house, outside.

This statement was ambiguous and necessitated the defence counsel to further ask: at the back of it [the outside house]? The witness agreed. The prosecutor gave an estimation of 50 paces, to which the defence counsel reacted: Roughly so, it doesn't matter. Later on, the witness was asked to give a description of the weather on the day in question. The defence counsel questioned her: what were the weather conditions like? was there any moon? The response indicated: No, it was just dark, since it was winter. But I was able to see because of the passing cars. The statement was meant to show that the passing cars had their lights on, although the witness herself did not clearly stipulate this. As discussed earlier with respect to CO/I5/MCM/MM4/1.4.87;⁴⁶ the magistrate reminded a witness to be more specific and elaborate in her descriptions of the place of the incident. In CO/17/MCM/MN1/1.4.87, confusion arose because a witness first claimed it was at dusk "mantsiboea" but then later said it was at night "bosiu". The confusion became even more profound when she argued that the two are the same. When further cross-examined by the accused: what do you mean, they are similar (closest translation of "li 'tsoana ha li fihla kae?"), she responded: "Ache" [oh well], I don't know.

In CO/79/HC/JK/3.3.87, one accused was asked to estimate the distance from which he was shouting at another. He looked through the courtroom window and said: A distance about to that red car. There were two red cars outside and

they were parked not quite adjacent to each other, and I personally was not sure which one the accused was referring to. The counsels agreed to the estimated distance in paces.

In this instance, the cars in question were not so far apart from each other, but had they been the accused's statement would have been inadequate.

USE OF ENGLISH IN THE RECEIVED LAW COURTS

A further observation concerns the use of English in the received law courts which is mainly connected to the fact that these courts were introduced by the British during colonial rule. In the Magistrates Courts there seems to be variations, most magistrates choosing to conduct proceedings in Sesotho because many people who appear before them are not represented and do not know English. In fact unlike in the past, provision has been made⁴⁷ for criminal proceedings to be conducted in Sesotho. In the High Court on the other hand, the proceedings are invariably in English perhaps because some of the judges are not Basotho, but may be also in view of the fact that from here appeal lies to the Court of Appeal, which is presided over by foreign judges. When asked to comment about this, the Attorney General could only say "I don't know, that is simply a scandal". However, Judge Molai had the following to say on this issue:

It is an awkward thing. I have been [I was] a magistrate for many years, I used to write my record in English; while everybody was speaking in Sesotho. The people have to speak in English [in the High Court] and I've got to provide an interpreter. What for, I don't know (Molai: 6.3.1987).

As he further pointed out, in the past there was a time when the High Court had only one Mosotho judge,⁴⁸ in the circumstances it was only plausible to have the proceedings conducted in English for the benefit of the non-Basotho judges. In his concluding remarks, the Judge said:

But I personally do not like it. It looks awkward ... If you go to England you won't find a court conducting proceedings in Sesotho or Setswana, etc. We are disadvantaged. I do not know English [well] myself, so I have to stammer all the time (Molai: 6.3, 1987).

Among the proceedings observed in the Magistrates' Courts all but two were conducted in Sesotho, except of course where arguments on points of law arose, in which event the presiding magistrate and the legal counsel(s) would often converse in English. However, it was observed that the magistrates and the counsels have a tendency of throwing in English words here and there, even when proceedings are in Sesotho.⁴⁹ But as expressed by the Chief Magistrate:

What I find to be most annoying here at the Magistrates' [Courts], an issue which we have brought up many times, is the provision that the record of the proceedings shall be in English (Matete : 8.5, 1987).

Thus when people require the records for purposes of civil litigation in the customary courts, e.g. for compensation claims, they are given these in English. This causes a lot of predicament, for many of them do not have an extensive knowledge of English, let alone the legal language. It is even more difficult because civil litigation in the customary courts is conducted in Sesotho, the court personnel at that

level, itself not being highly educated to be able to understand and handle records written in English.

The relevant Section Under Order No. 3 of 1973 provides that "... proceedings in civil cases and the record of proceedings in civil as well as in criminal cases, shall be in the English language." Thus in civil matters, provision is that English shall continue to be used, on the understanding that the parties shall be represented by legal practitioners; since the "papers ought to be filed in English and in certain standard formats. Even when he [a party] knows English he can;t do this on his own; because he must have the standard forms".⁵⁰ However as the Chief Magistrate further explained:

On humanitarian grounds we let the parties to speak in their own language [Sesotho] but the records are always in English (Matete: 8.5.1987).

Usually, as the Chief Magistrate further indicated, this is done in the interests of time. The main difficulty, as he noted is that, cases end up in the Court of Appeal, which is still presided over by foreign judges only. But in his opinion this should not constitute a serious complication because the records can always be translated into English when necessary for purposes of litigation in the Court of Appeal as it happens when cases from the customary courts proceed on appeal to the High Court, the records from the Judicial Commissioners' Court are translated accordingly.

What is crucial to note are the practical complications that occur during the proceedings due to the use of English.

From the observations that were carried out, the most specific problems concern interpretations made from English into Sesotho; and sometimes vice versa. In CO/79/HC/JK/3.3.87, the interpreter translated the word "mantsiboea" as afternoon when it should actually be evening.

The judge even questioned whether a correct translation had been made. In the same proceedings, a witness made a statement which the interpreter translated into English to read: Since she saw me in the area, she believed ... When the judge finally gave the translation himself it was reading as follows: Because she had merely seen me in the area ...

Also the word "molamu" was translated simply as a stick instead of a thick stick, (often used for fighting).

In CO/104/HC/JK/17.3.87; a witness stated: I was asked whether I could identify them ("ke ile ka botsoa hore na nka ba supa"), which was translated into English as: I was asked to identify them; rather than: I was asked whether I could identify them. The judge in this event had directed the interpreter several times to give the correct translation "e behe hantle ntate, ka Sesotho". Again the judge finally had to make the translation himself. Additional problems occurred when witnesses made expressions that have no direct English equivalencies, yet without the right translations their testimony would lose strength. For example, in the above case a witness was asked how many people were in the identification parade, to which she responded: "ka ntate, ha nka ba ka ba bala". The nearest translation of this could be: [I swear] By my father, I did not count them. The

interpreter simply translated it to read: I did not count them. The point at issue is that, wrongly translated statements could sometimes distort, if not change the content or version of testimony; or even make certain elements of it to conflict.

DELAYS

Another common feature as observed from the proceedings in the received law courts relates to the numerous delays that are caused as a result of various factors. Examples taken from the Motion Roll cases before the High Court on 23.2.87, can be used to demonstrate this point. All cases from CO/5 to CO/10/HC/JK/23.2.87 were postponed and so were cases CO/10 and CO/12. The main reason was incomplete filing or serving of papers. In CO/9/HC/JK/23.2.87, it was stated that opposing affidavits had not yet been filed; while in CO/10/HC/JK/23.2.87 it was mentioned that the respondent had not yet signed the affidavits. But when the judge probed deeper into the matter, it was disclosed that actually the affidavits being referred to, were not yet ready - that is, it was not just a question of the respondent appending her signature. In CO/16 to CO/22/ HC/JK/23.2.87 then CO/27, 28, 34, 39, 40, 46 and 52 and CO/61/HC/JK/23.2.87, replying affidavits had not been filed. In CO/19/HC/JK/23.2.87, a divorce case, the matter was 10 years old and it had passed through so many hands (lawyers) that for a moment, it was not clear as to who was now appearing for the applicant. Another divorce case

CO/80/HC/JM/3.3.87 was also about 10 years. All the above cases were postponed in one single day, with the exception of the last matter. Similar postponements were quite common on other Motion Roll days in the High Court.

As illustrated in various cases discussed so far, many matters are brought to court on insufficient or incomplete information. This would be relevant in cases where medical reports submitted were unclear or illegible, and where medical practitioners do not turn up to testify before the court. But further aspects were observed. In CO/10/MCM/MM1/1.4.87 in particular, it became quite obvious that the case had been brought to court on inadequate evidence. First, the police witness (for the prosecution) arrived late for the proceedings, and the magistrate reprimanded him for that. He confirmed that the accused had informed him that the deceased (a brother's wife) had died of stroke; and when he investigated the case, it appeared that no post mortem had been done. He said in trying to find out, he could not get an explanation for this irregularity.

However, later he said the accused had told him that he found the deceased already dead at the mortuary. Under cross-examination, the witness stated that he would agree that the impression he had been given was that the deceased died in the mutuary; although he could not say how she had got there in the first place. Earlier evidence heard by the court had disclosed that the deceased had first been taken to hospital by her children. The magistrate pointed out at the gaps in the evidence, and responding to the request made by

the prosecutor that the investigating officer be given one last chance to find out what happened, the magistrate said the matter ought not to have been brought to court, without complete evidence and thorough investigations in the first instance.

The defence counsel then said "justice must not only be done, but must be seen to be done". He stated that the questions he had put to the witness had clearly revealed that no investigations had been carried out. The prosecutor then declared that he had not yet closed his case and stated, therefore, that "my learned friend cannot object. I am still on the floor". However, the defence counsel continued to point out that the court could not order fresh investigations to be done, as its duty is to consider evidence adduced before it. The magistrate did not appear to be totally in disagreement with the statement, and as he stated:

It is evident from the evidence what had happened, the accused had incurred injuries before she fell at the water-well. The problem is that while she did not go to the hospital immediately after sustaining injuries, it is not clear what happened when she [finally] did get admission. In the interests of justice, the request for further investigations into the case to enable a just decision to be reached is justified. I am aware that time has been wasted. The matter should not have been before the court with the said inadequacies. I would accept that this could be a disadvantage on one side, but I believe this is necessary.

The proceedings were postponed to June 2nd. The defence counsel was not satisfied, and the court having been adjourned he said in his argument to the prosecutor, "the

first witness did indicate that the deceased was brought to the hospital by her children, therefore she could not have died of stroke when she fell at the well, nor was she just found dead at mutuary". The argument was that there must be some explanation as to why the deceased was taken to hospital in the first instance, which would explain the cause of the death.

In CO/11/MCM/MM3/1.4.87, the prosecution witness (PW6) revealed that the person who was before the court was not the one he had pressed charges against. The stolen property in question, had been released through the directive of one senior police officer. But it was not clear how the alleged criminal had been released, and how the man presently before the court was now being charged instead. But the statement of the prosecutor to the defence counsel that "there'll be no conviction at all", suggested he was aware of the gaps or weaknesses in the evidence. The prosecutor actually intimated that the defence need not even have cross-examined, because it was clear that the accused before the court was not being rightfully charged for the property in question. This statement was made during an adjournment.

There were many more observed cases, and the issues drawn from them point out to similar complications as those already described. It would not be possible to discuss all of the cases and use them as examples in this work.

CONCLUSION

From the descriptions contained in this chapter two

major conclusions can be made. One deals mainly with the idea that the received law courts represent a totally different judicial structure from the customary courts and the "unofficial" chiefs' courts. The other relates to the link between the received law courts and the adversarial model in comparison to its practices in the western world.

First, with the introduction of the received law courts came a totally different framework of dispute settlement which the Basotho people had never come into contact with before. The received law courts contrast sharply with the indigenous system now largely operating in the "unofficial" chiefs' courts, and to a large extent in the customary courts. The received law courts are set apart from the latter two sets of courts in a number of respects, mainly in ideological outlook and approach. The organisation of the received law courts, as described in the beginning sections, is much more complicated as evident in examining, for instance, the jurisdiction and powers of the magistrates of various ranks as well as the ways of bringing cases to the courts and processes of dealing with them once they are there. There are separate processes for civil and criminal cases with their distinctive rules pertaining to time limits allowed between each of the stages, parties involved, powers of different courts with respect to various causes of dispute, sentencing and so on. All of these are backed-up by law.

The above suggests a degree of separateness between the "unofficial" chiefs' courts and the customary courts on the

one hand, and the received law courts on the other. This becomes further illuminated in considering the kinds of matters that come before the received law courts, most of which do not involve customary law. At the practical level, however, the various sets of courts do not operate as separate entities but rather function as a continuum, with various courts sharing powers in terms of what cases each of the structures can handle depending on the jurisdictions they are afforded. Thus in this regard the view that the judicial system of Lesotho is dualistic is rendered inadequate, and the fact that the various court structures including the "unofficial" chiefs' courts perform complementary functions; indicates that the courts operate in an hierarchical order, and this dominates the practical reality of all these courts. An additional point is that the received law courts in general possess wider powers, with the Magistrates Courts having revisionary and powers of control over the customary courts, and the High Court and the Court of Appeal forming the appellant structure for all cases including those from the customary courts. Further to demonstrating that the received law courts occupy a position of seniority over the others, this shows that the idea about the parallelism of various court structures cannot to be held correct either.

The second strand of argument in the chapter was that the received law courts have a close link to the adversarial model of trial both in ideological and technical form. In theory they ought to work according to adversarial rules,

however, at the practical level the application of the adversarial model in this context meets with a series of constraints, produced by a constant interplay of factors determined mainly by the circumstances surrounding the existence of these courts, having to do with the fact that the model in this case is alien.

The constraints referred to above pertain to such factors as lack of adequately and suitably qualified personnel to deal with aspects of the received law like the interpretation of statutes; the lack of comprehension and appreciation of the meaning and how the adversarial rules are to be applied. For example, the majority of prosecutors in the Magistrates Courts have no formal legal training. That is in addition to the fact that, some Magistrates themselves are not legally qualified, while others are not sufficiently professional. These are coupled with the lack of appropriate cooperation from other supporting services as reflected in the police failures to carryout effective investigations, failure to provide adequate documentary evidence such as legible post mortem reports, loss of exhibits and the doctors' failure to attend proceedings. Further to the above, are constraints caused by the use of English in the proceedings, lack of legal representation in the Magistrates Courts⁵¹ especially, concentration of legal practitioners in the Capital, Maseru, inadequate numbers of established legal firms and so on.⁵² But added to these is the fact that the Basotho people generally have a different notion of how justice is achieved as founded in the other

coexisting mechanisms of dispute settlement. In this regard, complications are caused by people's tendency to bring notions of different justice processes into the received law courts proceedings, which frustrates the application of the adversarial rules even more.

On the basis of the above constraints it is argued that the adversarial model does not work in the context of the received law courts either, although it is reckoned that in this case, it is principally for different reasons than those offered in the works of Carlen (1976); Blumberg (1967, 1969) McBarnet (1981) and others. Here it is not just the people's lack of knowledge about the adversarial model, nor is it simply the manipulative practices of the court personnel which lead to the displacement of formal rules and emergence of "informal" ones. In the received law courts, the issues involved make the situation much more complex than that which has been observed in the courts in the Western world. Consequently, practices such as extreme delays, a series of postponements and adjournments⁵³ become the most prevalent when looking at how the overall structure of the received law courts operate leading to a conclusion that they represent a creaking system of the adversarial model.

CHAPTER 6

THE COURTS AND LEGAL REPRESENTATION

In this chapter, I examine issues related to legal representation in the courts of Lesotho. I begin first, by addressing general issues; which include looking at the historical aspects pertaining to legal representation, and its provisions in the various courts. Later, the analysis turns to practical issues, mainly concerned with how the adversarial principles are handled in cases where parties are represented by legal practitioners.

The idea is to further demonstrate the kind of constraints under which the adversarial model in this setting has to work. The constraints considered in this regard include for example, that there are few qualified legal professionals, shortages of sufficiently experienced legal practitioners, the inequitable distribution of legal practitioners and well established legal firms within the country. Furthermore the descriptions deal with provisions for legal aid as a measure that could improve on legal representation. The state of the legal aid scheme as shall also be indicated, is not satisfactory. By and large, the issues of legal representation, as discussed in this case, are connected to the fact that the concept is itself alien, and that it accompanied the introduction of the received law and its system of courts.

In general terms, the legal profession and questions

relating to legal representation of parties in Lesotho, as illustrated in the following descriptions, are not yet as developed as in the Western countries. One of the main indicators to this effect as argued mainly by the Attorney General and the Chief Magistrate is that, there are inadequate numbers of qualified lawyers. Previously a lot of them came from the Republic of South Africa. More serious endeavours to train locals as lawyers have been undertaken in recent years, but these have to be shared by all sectors which need legal services and skills. These include Magistrates, Public Prosecution, and other state and private sectors.

The state of the legal profession in Lesotho contrasts sharply with that in the western countries. For instance, in the study of the London area, Zander (1973) while admitting the static position of the legal profession at the beginning of the century, demonstrates that from 1960 onwards there has been an extraordinary growth in numbers of both Solicitors and Barristers. Which he notes could, to some extent, be attributable to the expansion of the legal aid service. The number of Barristers rose from 1,919 in 1960 to 4,076 in 1977; including 366 women representing an increase of more than a 100 per cent. For Solicitors with practising certificates, the figure rose from 18,438 in 1960 to 31,250 in 1976 i.e. an increase of 69%. While figures of the legal professionals in Lesotho are not available, the overall impression is that the numbers are very small relative to the functions demanded of them. In addition, in terms of distribution, there is a high concentration of lawyers and legal firms in the capital,

with most professionals staying there. The truth is, at district levels, legal firms are almost absent. And legal practitioners only go to the districts, when they have cases to represent.

Before going any further, it becomes necessary to look at the development of the concept of legal representation in Lesotho by setting it in an historical perspective. First it is important to recognise, as already hinted earlier, that legal representation is not a feature of the indigenous system for dispute settlement; and that it only came with the introduction of the received judicial system. It is in this manner that while Ashton (1952) indicated that in the Paramount Chiefs' Court wealthier people did employ special pleaders, he recognised that this practice was contrary to traditional procedure and theory. The absence of legal representation in the indigenous setting, can be appreciated in the context of how dispute settlement processes were organised. In the same manner, this will assist to explain how legal representation is still not practiced in "unofficial" chiefs' courts.

One has to appreciate that in the "unofficial" courts the parties themselves play a major role in bringing all important evidence to the court. Thus they are responsible for stating their case, calling witnesses and for asking any questions that make their dispute clear to the court. However, this is supplemented to a large extent by the role played by other participants in the proceedings, in the manner described in chapter 3. The proceedings are attended by

parties to a dispute, their kin and supporters, as well as other interested villagers. Together they attempt to settle disputes through conciliation, negotiation and appeal to applicable norms, other than merely ruling on the overt dispute brought to court. It is for this reasons that everyone present is allowed to bring forward whatever evidence they think relevant in a particular case; and also to ask any such questions they believe will clarify the issues involved. But even more crucial is the fact that, the role of the presiding authority in this context, is not only of a judge refereeing a contest between the parties but also, - together with his assistants or men of the court, - he has the onus to discover the truth about the matter before them. Therefore, they are also entitled to call upon and examine disputants and their witnesses; in order to elicit facts relevant in a case, and to breakdown any false testimony. In this process, everyone raises challenges to any witness whose evidence is suspected. Everyone, including the chief, can bring his own private knowledge to bear on the case in question, in order to find out the facts, and to arrive at a solution acceptable to both sides.

In addition, the lack of representation in these courts should be appreciated in terms of the purpose of the whole process of dispute settlement. The process is based on the notion of reconciliation and conscience. This, it is believed, could occur or be achieved by allowing disputants to talk out their grievances in an open manner, and in a way most suitable to them. It involves a full exploration or

understanding of the roots of the contention concerned, which is believed will promote or give rise to a feeling within the village that, it will finally assist to ease strained relationships and prevent matters getting worse.

The above are the kind of characteristics encouraged in the conciliation, mediation and neighbourhood justice schemes developing in the modern western systems.¹ In these acknowledgement is given to the positive role of informal justice and its success in resolving minor interpersonal disputes quickly, effectively and in a way that satisfies disputing parties, which the formality of the courts, their adherence to the due process model, their strict rules of procedure and adherence to adjudication are noted to fail achieve.²

The characteristics spelled out in the preceding descriptions are embedded in, and contingent upon the Basotho social structure, in which relationships among the people are multiplex and continuous; disputants and their supporters being bound to one another by cross cutting-ties (Cf Gluckman, 1969). The absence of legal representation in the "unofficial" Chiefs' courts and the customary courts is largely viewed in this light. It is in the context of the community-oriented nature and approach to dispute settlement in the village where the majority of the Basotho people live, and where relations mentioned above are still particularly strongly held, that the absence of legal representation should be understood. In another way, the above descriptions, serve to explain how even today, there are still people who

do not know much about the law concerning the right to legal representation, how to exert it if they need to, and about legal aid services as well.

What the Attorney General pointed out in an interview is that, the idea of legal representation starts by making certain presumptions. First, it usually presumes that representation by a legal practitioner is the best - that with legal representation one's case would be competently and efficiently put across, leading to expectations about a better and more satisfying outcome. Secondly, it assumes that there are lawyers, sufficient enough to carry out the service. The argument of the Attorney General was that, these assumptions may not match what actually exists in real situations. The second one has been already explained, pointing out that there are not enough trained lawyers in the country. I expound on this point further later on. With regard to the former, the Attorney General said that the main cause of concern is that "lawyers are mechanical", by which, as further explained he meant that they often would not provide people with proper worth while advice in incidences, for example, such as where an individual does not have a strong case or no case at all. To demonstrate this the Attorney General stated:

A lawyercannot advice you that you are going wrong [that you have no strong case], but will take your case to court. Nor would he call the two parties together for a talk.....They [lawyers] are one sided (Maope: 16.2.1987).

In this the Attorney General was noting the stress the

lawyers in Lesotho place upon their role of advocacy in the courts, and their disregard for the advisory function of the legal profession. This emphasis, as indicated later on is reflected in both the provision for legal representation and legal aid provisions. As further expressed by the Attorney General, this explains why in many cases; lawyers concentrate on trapping each other on technicalities of procedure, other than arguing on the facts of the case. He also raised an opinion that legal representation should include an element of competence, in the sense that, anybody who may not even be a lawyer, but is held competent should be allowed to represent another in a case. This, by implication, suggests practising the kind of representation operating in the "unofficial" chiefs courts and to a large extent in the customary courts.

From the explanation offered by the Attorney General above, it seems that many cases in the courts of Lesotho are decided mostly on the basis of technicalities of procedure.

What becomes most frustrating to the people, Judge Molai stated, is because:

People in the villages, when there is a case, many of them know whether or not the offence has been committed. But when the case comes to court, people are discharged on technicalities. We look at things like hearsay evidence, which people regard as important part of evidence and discard them. People in the villages do not understand these technicalities (Molai: 4.3.1987).

This demonstrates that the facts of the matter are often not argued. What Judge Molai further indicated is that this

causes loss of confidence in the legal profession. In addition, it explains a point noted earlier where the Attorney General expressed that, some decisions of the official courts cause a lot of bitterness among the people, hence other people seek recourse to the "unofficial" Chiefs' courts.

The next section addresses the position with regard to legal representation today. First, legal representation is viewed as having accompanied changes in the overall judicial system as contained in the preceding chapters. Hence it is a concept which can be discussed in relation to the customary courts and the received law courts, which together form the official court structure, brought into operation during the colonial period. However, as shall be realised, legal representation applies in varying degrees in these courts.

PROVISIONS FOR LEGAL REPRESENTATION

This section examines the provisions for legal representation but also looks at how far this principle is upheld in practice. These descriptions should be understood within the context of what has been already said of the official courts in the last two chapters.

With regard to the customary courts, we have already noted that in both civil and criminal proceedings, procedure and rules of evidence have, to some extent, become far more complex, although they still bear much resemblance to those in the "unofficial" courts. For instance, principles such as

hearsay which apply in the received law courts also operate in the customary courts. In addition, as revealed by some of the informants³ in criminal cases particularly, cases before the customary courts have to be conducted along the lines set for the received law courts. A similar view is portrayed in the works of Palmer and Poulter (1972); Perry (1977); Hamnett (1972) and others, noting the more formalistic and complex rules in the customary courts. On the basis of these arguments alone, one would agree that legal representation is justifiable. But even more, whereby people are not familiar with the procedures and do not comprehend the manner in which proceedings are conducted by the court, such as in this event where the rules employed are of foreign origin, then legal representation becomes extremely necessary and vital.

A point raised by the Attorney General regarding the rules for civil litigation in the Magistrates' Courts, for instance, is that "the written procedures are intended for legal practitioners and are very complicated "li thata"". He further stated ^{that} no individual person, therefore, can lodge a claim on his own behalf in these courts, without the assistance of a legal practitioner. The same would apply with regard to the High Court Rules of course regarding which the Attorney General said:

In the High Court it is worse. No one can go there without a lawyer. Those who do try cheat. They request the lawyers to draft papers for them; but they have often been disclosed (Maope: 16.2.1987).

What the Attorney General emphasised is that the rules of procedure and evidence at this level of the judicial process are very complicated not only to the lay man but to the people generally, including the educated. In a further statement he explained that this means that, people have no access to the highest courts of the land because of complicated rules. As he put it:

... it is not just the majority, it's absolutely everybody. An educated person, for example, if I give him the High Court Rules and say he should proceed on his own, there's absolutely nothing he can do (Maope: 16.2.1987).

The Crown Counsel Ntsonyana reiterated that civil procedure in the received law courts has to be done strictly on paper, and no ordinary Mosotho can draft all the documents which have to be filed in the required manner.

The result, as argued by the Attorney General, is that people are forced to seek services of legal practitioners, but as he further stated what is particularly disturbing is the reality that many just give it up. In his own words he said:

But often, people seek no relief of the courts "ba lahla feela tjena" so that you find the law is contravened, but many of such actions never reach the courts (Maope: 16.2.1987).

He further intimated that with additional constraints surrounding the legal profession people just give up because they do not know how to institute proceedings.⁴ This became clear from an example he provided of a man who had approached the Law Office requesting it to take up a matter on his

behalf because he not only lacked skills of advocacy, but also had no means of acquiring services of a legal practitioner.

One evident fact, as to be indicated below, is that while there has been a shift towards the accusatorial approach in the official courts, legal representation has not yet been introduced at all levels of the judicial system. For the customary courts, it was provided at the beginning that no advocate or legal practitioner would be allowed to appear or act for any party before a Native Court.⁵ A new provision was later made, in which legal representation was allowed only in criminal cases, though it made an alternative that parties could also defend themselves.⁶ This provision is the one that currently applies, and it states as follows:

Every person who is charged with a criminal offence in the Central or Local Court should be permitted to defend himself before the court in person or by legal representative of his own choice who shall be a legal practitioner admitted to practice in the courts of Lesotho. In civil proceedings no party may be represented by a legal practitioner, but shall appear himself, provided that the court the husband or wife, or guardian, or any servant, or the master, or any inmate of the household of any plaintiff or defendant, who shall give satisfactory proof that he or she has authority in that behalf, to appear and act for such plaintiff or defendant.⁷

Taken from one point of view, this provision reflects a further shift towards the received law principles, in that it introduces the concept of legal representation into the Central and Local Courts, leading to even more blending of procedure as earlier described. In addition, by law, legal

representation is made not to apply in the majority of cases heard in these courts,⁸ namely the civil cases. As similarly pointed out in Palmer and Poulter (1972) despite the shift from the inquisitorial to the adversarial system legal representation has not been introduced in civil matters before the Central and Local Courts. The point is that the bulk of the work of the customary courts generally, consists of civil disputes, and that criminal proceedings are a rare phenomena. This was confirmed in the statements of the Judicial commissioners, and was evidenced by the fact that no criminal proceedings were observed while I carried fieldwork, except in the Roving Stock-theft Central Court. Thus in the majority of these courts' proceedings; the people appear on their own except where assisted by those people included in sec. 20 as quoted above. This is an additional reason why in many respects, proceedings are carried on in a fashion similar to that in the "unofficial" chiefs' courts.

The surprising thing was to discover that despite the shift towards the due process model, the absence of legal representation at this level is actually a welcome factor even among legal professionals. First, it is argued that it saves people from costs of having to pay for lawyers; whose services are very expensive.⁹ Secondly, it is held to be a good measure not to insist on legal representation for all courts, bearing in mind the insufficient numbers of legal professionals in the country. In the circumstances, the delays which could have otherwise been encountered if people had to appear represented, have been avoided. However, in

considering the whole situation, it was admitted that in the light of changes that have occurred in the conduct of proceedings in the Central and Local Courts, denying lawyers the right of audience in civil cases may occasionally result in some injustices.¹⁰

But as raised in some of the interviews¹¹ that were conducted; even where criminal cases are concerned, legal practitioners seldom appear in the Central and Local Courts.

Such reluctance was explained to be connected to the fact that these courts are not regarded as a proper legal ground, since proceedings in these courts are run mainly along procedures similar to those in the chiefs' courts, and as such have no place for legal professionals. In another sense, cases that come before the Central and Local Courts are regarded as not involving much law, to require extensive legal expertise or advocacy. These allegations reaffirm the arguments made in Chapter 4 that, while in theory the conduct of proceedings in the customary courts generally ought to be adversarial, there is a general awareness that in practice, they work in the manner not very different from that employed in the "unofficial" chiefs' Courts. This of course could be attributed to the kind of personnel in them, who possess no legal training. With the absence of legal representation procedures of the chiefs' courts become employed even more.

Judge Molai confirmed that procedure in the Local and Central Courts "is not complicated", but "is simple". So that one "does not need a lawyer" and can appear on his own.

As he further stated:

No lawyers are called upon to bring in complicated issues of law. You are two Basotho, arguing your case. You get a decision without involving yourself into many expenses. Whereas in the Magistrates Courts it is more expensive.

Lawyers are very expensive. Trained legal personnel would introduce things which do not really belong to custom ... because the confusion [problem] is that they are going to create confusion there.

People who go to the Local Courts, do so because they know what they want. They do not want lawyers who introduce complicated points of law. They just argue simply, and at the end of the day; they understand (Molai: 6.3.1987).

A view similar to the above was mentioned by the Chief Magistrate. He confirmed that in the Central and Local Courts, people are not allowed legal representation. He then continued to say:

We want them to work out their matters in Sesotho as they wish to do, which is less expensive (Matete: 8.5.1987).

On this basis, one could argue that the absence of legal representation at this level is largely a conscious effort, to let these courts operate in the manner people are accustomed with in the "unofficial" courts. The fact is that it fosters the continuity spoken^{of} earlier.¹² However, the argument raised in Maqutu (1982) is that disallowing lawyers the right of audience in the Central and Local Courts, causes protracted litigation in the sense that cases often have to be tried due to procedural irregularities. By implication, this means such situations could be avoided if legal practitioners are engaged from the beginning. The real issue is that the customary courts are a hybrid system, mixing customary law procedures with those of the received

law, hence both positive claims and counter-claims for introducing legal representation at this level can be raised.

In the Roving Stock-theft Central Court, legal practitioners appear with a much higher frequency. This could perhaps be explained in terms of the fact that, this court holds the jurisdiction equivalent to that of the Resident Magistrates' Courts. Thus stock-theft proceedings can be taken as the only kind of criminal cases which tend to attract the attention of legal practitioners in the whole customary courts structure. Another way of explaining this situation would be by assuming that because at one time this court was abolished, and then stock-theft cases were heard in the Magistrates' Courts; legal practitioners became accustomed to appearing in their proceedings and have continued to do so even now that this court has been revived.

In the Judicial Commissioners' Court, legal practitioners are allowed to appear even in civil proceedings. Thus at this level, legal practitioners are granted the right of audience equal to that they have in the Court of Appeal, the High Court and the Magistrates' Courts.

As pointed out in Chapter 3, the bulk of the work of the Judicial Commissioners consists of hearing civil appeals from the Central Courts. Some of the problems encountered in this court in connection with legal practitioners were mentioned earlier (Ch. 3), and they partly arise due to the fact that this court sits from district to district. As observed during the field research, legal practitioners are in many cases late for the hearings or request for

postponements; often too late. On other occasions they fail to turn up at all; and this happens frequently when the court is on session in the outer districts. Explanations for this are sometimes connected to the distances they have to travel to the districts. The fact is that they would also be having cases in the Magistrates' Courts and the High Court in the Capital, and thus unable to fulfil the commitments of their tight schedules.¹³ On the other hand, it is because of their lack of enthusiasm to appear in the customary courts, giving preference to the received law courts, in particular, the High Court.

The above can further be demonstrated by what the Chief Magistrate said in an interview, that because of the scarcity of legal firms, the majority of those legal professionals thought to have sufficient working experience are overloaded with cases. As he further explained "legal practice has become more of a business than a service to the people". Hence the already established practitioners prefer to work alone. In the words of the Chief Magistrate:

You'd find that in Maseru alone, in one day he's got so many [cases]. The people have paid him and their cases must proceed. Others are remanded in custody; some have got problems - perhaps it's matters of "support" - but he can't do them all at the same time. You'd find that his schedule for the month is packed, not only here in Maseru, but for Mochale's Hoek, Mafeteng and so on. That is the most painful thing (Matete: 8.5.1987).

This was confirmed by observations during the field research, that it was often the same lawyers appearing in the majority

of cases heard in the High Court, or the Magistrates Courts, or the Judicial Commissioners' Court, or the Roving stock-theft Central Court.

In the circumstances spelt out above, those people in the district are often the ones to suffer. For instance, from the observations obtained while the Judicial Commissioners' Court was on circuit in Quthing, only in 4 cases were both parties represented. In 6 cases in which parties ought to have been represented, legal counsels were not in court. In 17 cases, there was no legal representation, there the parties were appearing on their own behalf. These figures are given from a total of 34 observed proceedings. These contrast sharply with the fact that in all 173 recorded courtroom proceedings, involving both civil and criminal matters, observed in the High Court, the parties were always represented. While comparative figures cannot readily be provided for the Magistrates Courts the overall impression is that legal practitioners appear at a higher degree in criminal cases before them and in almost all civil cases for reasons offered later on.¹⁴ But in the main this goes to demonstrate that legal representation in Lesotho is not a general feature as in the western courts.

To demonstrate what actually happened in some of the above cases; a few examples from the Judicial Commissioners' Court are described. On one occasion, this was on 3.6.87, the assessor asked a party in one case whether his counsel had arrived. The answer was in the negative. The Judicial Commissioner then asked who the concerned counsel was. The

assessor whispered something in response, and then I overheard him saying that the counsel had sent a message that he may be available that afternoon at 2.00 o'clock, as he had another case in the High Court. The court had to be dismissed.

On 4.6.87 in the office, an elderly lady asked the court clerk: hasn't he rung yet? The court clerk in response asked: who 'm'e (mother)? The old lady said: Ramodibedi (one lawyer's name). The response was in the negative. The lady then remarked: it seems I'll have to fetch him in person from Maseru? A further example was obtained from the proceedings of CO/9/JCCQ/JCS/4.6.87. The court clerk appeared in court and handed over a piece of paper to the assessor, who in turn passed it over to the Judicial Commissioner. It came out that the respondent's counsel had rung to say that he was on the way. The appellant was requested to sit down, as the Judicial Commissioner wanted to find out whether the respondent wanted the court to await the counsel. The respondent replied that if the counsel was available he wanted him. The Judicial Commissioner asked him to state what exactly he wanted, noting that "he's [counsel] not yet here". The respondent then said the case should proceed.

Following a brief adjournment in CO/13/JCCQ/JCS/ 4.6.87, the Judicial Commissioner asked the appellant: Where is your counsel? In response, the latter said he did not know. He was then directed to go and look for the Counsel. On the morning of 9.6.87, both parties in the matter that was

supposed to proceed were to be represented, but their counsels were not in court. The assessor remarked: "these counsels do not take their job seriously". At about 10.30, the two counsels showed up, and the Judicial Commissioner reprimanded them that when they come to court; they have no other business to attend to. He then proceeded: "you start in my court at my time, not your own". The counsels apologized.¹⁵

The procedures in the received law courts, as described in Chapter 5, are even more adversarial than in the customary courts. One criticism often raised against the rules employed in the received law courts is that they disadvantage many of the Basotho people (Palmer and Poulter, 1972), mainly because they are not used to the technicalities and formalities involved. In this instance, as shall be indicated in the next section, the situation is made worse because it is not only the ordinary people who cannot follow the rules, but legal practitioners as well tend to experience similar problems. For instance, the Attorney General, as quoted earlier, insisted that "it is not just the majority who do not understand the new procedures. It is absolutely everybody". Examples taken from some of the court proceedings observed during the field research will be used to demonstrate that to some extent, legal professionals also have to struggle to cope with the demands of received procedures and rules of evidence.

One of the most prominent causes for the above situation, as demonstrated by the explanation given by the

Chief Magistrate during an interview is that, fresh legal professionals newly admitted to the Bar, lack the necessary experience for courtroom work. This problem is further compounded by the limited number of legal firms, which means that the newly admitted practitioners more often than not; cannot be absorbed in already established firms, but rather have to stand on their own and fend for themselves. Hence they learn how to handle the procedures on the job. As the Chief Magistrate further stated, in many such instances, people's cases are not well presented or defended, causing a lot of dissatisfaction. This perhaps clarifies the point raised by Judge Molai that people look to the received law courts with suspicion. This is how he put it:

... you find that people think that they are going to be cheated before this court. So instead of concentrating on what you are asking them, they start thinking of other things. I don't know why they should have that feeling in the Local Courts. But in the Magistrates Courts and this court [High Court], it is because they see lawyers. It is a long standing belief that lawyers are crooks, and people who come to court are cheated (Molai: 4.3.1987).

This could be tied to the point about cases being mostly decided on technical issues of procedure and also to the Attorney General's point that decisions of the official courts often cause bitterness among the people.

Going back to the descriptions about legal provisions for representation, in the received law courts legal practitioners are given the right of audience in both civil and criminal proceedings. For the High Court and the

Magistrates' Courts, legal representation is provided for under Section 171 of the Criminal Procedure and Evidence Act of 1981. This section only refers to a person who is being charged. This is a general feature for Lesotho in which all provisions for legal representation do not go as far back as the time of arrest and beyond conviction. Further to the above provision, Part IV of the Subordinate Courts Rules, Proclamation No. 58 of 1938 states that a person may appear and conduct his case in person, or through an attorney or advocate duly instructed by an attorney.¹⁶ Part V of the same Rules concerns Pro Deo applications, whereby a person who desires to sue or defend as a pauper may apply to the court. If the court satisfies itself that the applicant does not have sufficient means or earnings to pay the court, it may order that the process of the court be served free of charge, alternatively, it can direct the appointment of an attorney to act for such an applicant. The Pro Deo system works mainly in murder and treason cases. What this means is that in criminal cases before the High Court; most of which are murder trials and in others carrying corporal punishment, legal representation is guaranteed. The system has been said to cause some problems because the counsels so appointed, are only paid for appearance in court and not for making investigations, interviewing the clients and witnesses. Thus this kind of work is not very popular, as it is seen as a disadvantage since it cuts on the resources a counsel would otherwise make.¹⁷

As indicated by the Chief Magistrate, in many other

criminal offences coming before the courts of the magistrates, a lot of people appear unrepresented. As he stated, while some people obtain the services of lawyers; there are many other criminal proceedings, including very serious ones, "where one has to go it alone, because he has no money". Another thing the Chief Magistrate noted as complicating matters further, is that it appears there is no control of fees charged by various lawyers. As he put it:

Everyone charges what he likes.
Sometimes someone who has acquired a
lawyer, when you look at his case, you'd
find it didn't [really] require services
of a lawyer (Matete: 8.5.1987).

In his conviction, lawyers do not appear sufficiently enough in the Magistrates courts, and things could improve a bit if, in practical terms, the Magistrates could also be allowed to grant Pro Deo and Legal Aid as in the High Court. An assessment of the legal aid scheme at the moment is given in the next section.

The problem of unrepresented parties in the Magistrates Courts, is particularly common in the districts; as many lawyers reside in Maseru (the Capital), only travelling to the districts when they have cases in which to appear. This point was raised earlier, but it supplements what the Chief Magistrate was noted to have said regarding lawyers who, in addition, take on too many cases than they can possibly fit within their schedules. In consequence, people at the district level are made to suffer; due to the failure of their counsels to turn up for proceedings, thus causing numerous postponements, adjournments and delays in the

administration of justice.

The position with regard to civil proceedings before the Magistrates Courts and the High Court is quite different. For, as explained by the Chief Magistrate, in these matters people have no choice but to obtain legal practitioners' services. He noted that one would have a very difficult time trying to represent himself, because the proceedings and the standard formats to be prepared are complicated and written in English. Without representation, people would thus not be able to bring up a case in the first place, because they would not know how the papers have to be drafted. Hence they are forced to pay for the service, especially where matters concerned are of utmost importance to them. The Attorney General, in an attempt to demonstrate the magnitude of the above problem, stated that in certain instances because of the people's lack of the knowledge of the law and technical procedures, also because of lack of sufficient means to acquire legal assistance, some of them decide not bring their cases to court. Thus even in criminal matters, one finds that offences are committed but are never dealt with accordingly. In his conviction this is a very disturbing situation.

LEGAL AID IN LESOTHO

As hinted earlier the legal aid services in the country are still very much unsatisfactory, hence the contention that the system is still in its early state of development. The

arguments made in this section are based on the view that the provisions for legal aid can have influence on legal representation, assisting to reduce the large numbers of people appearing before the courts on their own especially in most serious cases. For comparative purposes, the Hughes Report (1980) which focuses on the Scottish legal aid system, is the one mainly referred to here as it has been found to contain background facts similar to those summed-up with regard to the position of legal aid in Lesotho.

The scheme was established in terms of the Legal Aid Act of 1978, and only came into operation in 1979. This contrasts with the position in Scotland as noted in the Hughes Report (1980) in which civil legal aid was introduced in 1950, but even prior to that the Scottish legal profession had long accepted the representation of the poor without a fee as a professional duty. In 1424, provision had been enacted for the court to appoint an "advocate" in civil cases. Then in 1525, two advocates for the poor were appointed and received a stipend from the Treasury. During the 17th Century the practice of appointing members of the Society of Writers to the Signet as agents for the poor in the Court of Session developed. This was formalised by an Act in 1784 which set out procedure for admission to the "Poor's Roll". It marked the beginning of a system where the means of an applicant, and merits of his case are first examined before legal aid is granted. Since 1825, local schemes for providing representation for the poor were modified several times but the "Poor's Roll" remained

substantially the same until 1950, when major reforms were made as a result of expressed feelings for the need for change.

The 1978 Legal Aid Act in Lesotho, provides for assistance to persons who have insufficient means to obtain services of legal practitioners to represent them in their trials. As in the case of provisions for legal representation, legal aid emphasizes the need for representation only in court process. In England and Scotland legal aid consists not only of schemes for assistance in civil and criminal proceedings, but extends to provision of advisory assistance (Hughes Report, 1980). Thus in the case of Lesotho emphasis is placed on what the Report on Legal Services in Rural Africa¹⁸ termed "traditional legal aid", according to which concentration is upon providing defence lawyers in civil and criminal cases, without the concomitant advisory service.

The provisions in the Act recognise that it is in the interests of justice, that people without sufficient means be provided legal representation in the form of the Chief Legal Aid Counsel and his assistants, to undertake the defence of such persons as if they were legal practitioners instructed by them. Such assistance is provided for in criminal cases committed for trial by the High Court,¹⁹ and in criminal cases before the Magistrates Courts, provided the offence a person is charged with is that of a class specified by the Minister; and provided that the particular court is presided over by a Resident Magistrate.²⁰ In other criminal matters to which

the above sections do not refer, if satisfied that "for special reasons it is in the interests of justice that" a person "should have legal aid at his trial" and that "such person has insufficient means to enable him to obtain services of a legal practitioner to represent him at his trial",²¹ a Legal Aid Counsel may undertake to appear in defence of such person as if he were duly instructed. While in accordance with the Act the Minister may, by notice published in the gazette, specify such criminal offences for which legal aid is applicable in the courts of the Resident Magistrates, such schedule of offences has not yet been produced. Thus legal aid remains inapplicable in these courts, hence indications by the Chief Magistrate that legal aid is not yet available in the Magistrates Courts in which circumstances, even people with serious criminal acts still appear unrepresented in a number of cases.

In civil cases, legal aid is provided for in causes or matters instituted or intended to be instituted in the High Court, or a Magistrate Court; again only if presided over by a Resident Magistrate.²² In these instances any prospective party may apply to the Chief Legal Aid Counsel for him to undertake the representation. Upon receipt of an application the counsel should satisfy himself that, first, the applicant has sufficient grounds for instituting or defending the proceedings in question; secondly, that it is in the interests of justice that legal aid needs be provided for purposes of those proceedings; finally, that the applicant has insufficient means to obtain services of a

lawyer of his own account. Only then can a Legal Aid Counsel undertake the representation of an applicant. The civil causes and matters to which the above section applies, however, exclude those within the jurisdiction of the Central and Local Courts and "such other classes of causes or matters as shall be specified by the Minister by notice published in the gazette."²³ With regard to the Central and Local Courts, it could be assumed that the intention is to keep in line with the provision that no legal practitioner may appear on behalf of a party in civil proceedings before these courts, a very confusing provision taking into consideration that by law these courts have to apply adversarial rules, and that the majority of cases they hear involve civil disputes. This is a further indication that it is officially known and accepted, that the Central and Local Courts are in practice not adversarial, despite what is theoretically upheld.

Provisions for legal aid extend to appeal cases; including those before the Judicial Commissioner's Court, and this applies whenever a person seeks to appeal from a conviction or sentence imposed by any court in a criminal case, or from any final judgement or order in any civil cause or matter, on application. In the latter, the Legal Aid Counsel must satisfy himself on the points mentioned earlier - that the applicant has sufficient grounds, that it is in the interests of justice, and that the applicant has insufficient means.

To ensure that all attempt and effort is sought to assist poor persons, where the Chief Legal Aid Counsel is

unable, either personally or through a Legal Aid Counsel under him, to act on behalf of any person who qualifies under this Act, or if for any other reason he is satisfied that the need for justice so requires, he may instruct a legal practitioner to act instead and pay him such fees as may be prescribed. In respect of such proceedings the legal practitioner is subject to the instructions of the Chief Legal Aid Counsel.²⁴

The statistical returns of cases taken up by the Legal Aid Office do not easily render themselves to analysis, for one, the methods for their compilation are inadequate. Some assessment is made below, to determine areas in which legal aid is mainly supplied. The figures of cases handled in 1984 and 1985 as appended²⁵ are used as a sample of tables obtained from the office. The data, however, are insufficient to enable one to draw meaningful conclusions. For example, the statistics do not indicate the distribution of cases by district, nor do they tell us anything about how many private legal practitioners were used, how many cases were rejected and so on. From the figures for 1984 and 1985, a general increase in the number of cases reported to the Legal Aid Office can be noted. This is more evident when one looks at the motor-vehicle accident claims which numbered 59 in 1984, and rose to 107 in 1985. The highest figures were of claims for maintenance ("non-support"). Also the tables reveal that more civil than criminal cases were reported and that matrimonial matters - divorce, maintenance claims, judicial separations - predominate. The

proportions of both matrimonial and non-matrimonial cases together show an increase, though not so dramatically considering that the scheme has been in operation since 1979.

Some of the reasons for this may become obvious in the following descriptions.

The Legal Aid Office is not a fully fledged department, but a division (unit) within the Ministry of Justice. The Minister responsible possesses powers to appoint the Chief Legal Aid Counsel and as many Legal Aid Counsel, as may from time to time be necessary. Thus the Ministry of Justice exercises all control over the unit. For the whole country, the unit in Maseru is the one in charge of cases referred for purposes of legal aid. It is in this sense that the Acting Chief Justice named the Chief Legal Aid Officer as the most popular lawyer, because he appears in cases all around the country. This would mainly be in appeals in the Judicial Commission's Court which sits from district to district. The position described here is different from the one in Scotland, for instance, where the administration of the legal aid system is the responsibility of the Law Society, but in practice, the fund and various schemes are administered by a number of committees, with the Society's Legal Aid Committee making policy decisions in relation to the future of legal aid. The Legal Aid Central Committee consisting of solicitors, advocates and laymen, generally oversees the administration of legal aid including various schemes, and also prepares annual reports on the administration of the schemes, and prepares estimates of expenditure for the

Society to submit to the Treasury. There are in all 16 Legal Aid Committees in Scotland and they deal with applications for civil legal aid in the Sheriff Courts, while the Supreme Court Committee in Edinburgh handles applications for legal aid for cases in the Court of Session, and in criminal cases on appeal (Hughes Report, 1980). Another notable feature of legal aid in the western world which is absent in the case of Lesotho is the variety of alternative measures²⁶ for provision of legal services. These include alternatives such as legal expenses insurance, contingency fees, duty solicitor schemes, legal aid, all of which could be described in the words of Bankowski and Mungham (1976) as forming part of attempts to bring the law and lawyers to the people. The existence of the welfare rights lawyer, as described in the work of Marcuse (1969), could be viewed in the same light.

In an interview with him, the Chief Legal Aid Counsel mentioned that at the moment the unit operates under extreme personnel and budgetary constraints. As he stated, the professional staff in the unit is insufficient. There are only two lawyers - including the Chief Legal Aid Counsel himself. Thus the amount of work they have is appalling. They do the bulk of the office work as well, including drafting court process, summonses and pleadings, interviewing clients and appearing in court. They have to attend to client's files and their own diaries, as the supporting staff is also inadequate and not well trained for the duties. It is surprising that in the light of increasing numbers of

applications received, there have been no corresponding increases in professional staff. With regard to finances, the Chief Legal Aid Counsel said it is difficult to understand how they are expected to cope under the stringent budgetary provisions. He mentioned that even with the contributions their clients are expected to make towards the costs involved, they find it difficult to function, and each year some cases have to be postponed till a later time, when finances become available.

Since the Act makes no provision for anything of the kind of Legal Aid Board to consider applications, the two counsels having interviewed the clients have to decide on which cases are to be allotted the assistance. The Chief Legal Aid Officer stated that with the means test setting the limit of M1,000 in order to qualify for legal aid, the exercise is extremely difficult and often they have to use their discretion, since things like livestock, which according to the regulations have to be counted in considering an individual's means, are difficult to assess. First, it is not easy to know when one owns or does not own stock, but in addition, it is difficult to assess its amount and evaluate it.

One important issue is that the people do not know about the service. For people in the districts the problem is even bigger, with the location of the Unit in Maseru. The Chief Legal Aid Counsel himself mentioned that the scheme is not well publicised and that it would be unethical for them to advertise themselves employing commercial publicity

methods; just as it is for any legal firm. When the program was initiated it was announced regularly over the national radio station, but he expressed doubts whether that was sufficient. The most revealing statement in this regard came from an interview with the Chief Magistrate when he stated that, if people knew about the service, they would perhaps make use of it in cases such as those pertaining to maintenance claims which often cause problems in the Magistrates Courts due to the parties' failure to produce worthwhile evidence as in support of their claims.

As the foregoing descriptions indicate, the situation with regard to legal aid is no brighter. One finds in it, a series of constraints. Consequently it means the state of legal representation cannot be improved, as the legal aid scheme itself is staggering. Thus those who cannot afford services of legal practitioners have to do without, sometimes defending themselves against opponents who might be represented.²⁷ The High Court seems to be the only place where legal representation is guaranteed, with Pro Deo and Legal Aid employed where parties cannot afford it. However, problems still exist with those people who are not adequately informed.²⁸

LEGAL COUNSELS IN PRACTICE

The descriptions made above, serve to confirm what has already been said in the earlier chapters. For instance, they reaffirm that at the practical level, the customary

courts are influenced by principles similar to those working in the "unofficial" chiefs' courts. With regard to legal representation, we have noted how in both the customary courts and the chiefs' courts the principle is not practised.

Not only that, in respect of the customary courts, the absence of legal representation is actually justified as a preferable situation. Thus re-emphasizing the point that there are some similarities, and more than that a kind of continuity between these two court structures. This can be measured in terms of the characteristics, as well as practices common to both.

Within the received law courts as we have seen, legal representation is practised, although not to a very satisfactory degree and within certain constraints or limitations. What is important is to recognize that such constraints pertain largely to the peculiar circumstances under which the courts are functioning. These, as mentioned once before, include shortages of trained legal personnel, limited numbers of legal firms, lack of sufficiently experienced lawyers, and the people's lack of knowledge about legal representation. In the main they arise from the fact that the adversarial model and the idea of legal representation in this case, are basically of foreign origin.

The circumstances of the judicial system in Lesotho, and the social environment make it somewhat difficult for legal representation and for lawyers to function in a manner similar to their counterparts in other adversarial systems, especially in the Western world. This point is followed up

below, providing some examples of what legal practitioners do and how they operate in practice.

To highlight some of the practices common in proceedings where legal practitioners are involved, some examples picked from the courtroom observations made during the field research are used. The main argument to be portrayed is that the circumstances within which the official courts structure as a whole exists, tend to influence the manner in which the system, as well as legal practitioners, function.

One factor which influences practices of legal practitioners in court is namely that, they have to operate among people who are otherwise not aware of the role of legal representation. The Basotho people generally, as already noted, are not familiar or accustomed with the received law rules of procedure and evidence. But even more than just the issue about lack of awareness about the role of legal representation, the point is that they have a totally different perception of how justice is to be obtained. At the back of their minds, they still have the idea that one is allowed to put forward his case in court, and that he is given a chance to explain the facts involved as he sees them.

A close look at the following example, provides a clarification for the above argument. Although the example was taken from the proceedings of the "mock trials"²⁹ it represents the thinking of the majority of the Basotho people; about why cases, or rather why parties and witnesses have to appear in court in the first place. On this occasion, it was the mother of one of the accused persons who

was giving evidence. She brought up an issue that she had not included in her original statement. When asked why she had not mentioned it before, she responded that she never regarded the action as signifying that her son had "stolen the peaches, because he was very young when this happened".

The judge asked why she had not previously included this fact together with the explanation she had just given, to which she stated: "I knew I was going to come to court, and then I would explain to you everything". The issue is that even with legal representation, people still believe they are to be allowed to state their side of the story, and to elaborate on other evidence they may have supplied their counsels with. For them legal practitioners are there only to assist, or as a kind of support to the parties and witnesses, not as agents who totally take over the whole proceedings. They do not appreciate the fact that legal practitioners make presentations on their clients' behalf, and as such have to be thoroughly instructed.

The above descriptions can be looked at from another angle, that legal practitioners by virtue of their training in the adversarial principles, have a much better conceptual view and understanding of how the model should work. But the fact is that in practice their knowledge of, and attempt to work according to adversarial rules of procedures and evidence, are counteracted by factors prevailing in the overall social structure within which they are functioning.

The other issue is that the people generally have a different conceptual framework of how justice processes work

and fail, for example, to cross-examine, answer to questions and so on. In the end what lawyers do, is influenced by these factors. What one sees in their practice, as reflected in the examples below, are consistent endeavours to cope with the rules of the adversarial model, in a totally different non-western environment. What legal practitioners rely on is what they have learnt in their training, and as shall be indicated in the descriptions that follow, they run into problems of not complying with the prescribed rules. This whole situation should be understood in the light of the circumstances that surround their work as already described in the earlier sections.

One of the most vivid features that comes out in observing the proceedings in which legal practitioners appear, particularly in the received law courts, pertains to the amount of delays experienced in the administration of justice. This was noted as a common factor in cases coming on motion before the High Court; many of which are civil matters. It was illustrated that these delays occur for a variety of reasons including failure to compile necessary documents, incomplete service of papers to the other parties, failure to provide the court with necessary documents, and so on. The following examples serve to demonstrate the nature and magnitude of the problem in greater detail.

In CO/8/HC/JK/23.2.87; it was revealed that the counsel for the applicant had just been served with opposing affidavits. In CO/9/HC/JK/23.2.87, opposing affidavits had not yet been issued, therefore, a request for postponement

was made. In CO/10/HC/JK/23.2.87, while the initial claim in requesting postponement was that the respondent had not yet signed the affidavits, it later appeared that the concerned counsel had in fact not yet prepared them. That is, they were not ready for signature. In CO/17/HC/JK/23.2.87, replying affidavits had not been filed. In CO/25/HC/JK/23.2.87, it was the notice for intention to defend which had not yet been received. While the counsel for the defendant claimed papers were ready, it later emerged that they had not been properly served. Another request for postponement was made.

A complaint was lodged by the applicant's counsel in CO/128/HC/JL/5.5.87, that he had filed his own papers a long time ago. Although the judge noted his sympathy for the above complaint, the matter was postponed to the following week. In another matter, CO/129/HC/JK/5.5.87, the papers were not complete. The counsel for the applicant noted that the matter had been postponed once before, in order to allow the respondent time to file relevant documents. In response, the latter's lawyer claimed he could not see what the applicant's counsel would suffer, by allowing the matter to be postponed. The judge indicated that costs are involved. Then the respondent's counsel stated that the question of costs should be considered alongside with the merits, "you see we're challenging the merits of the case. My learned friend is running away from something deeper". The judge in return indicated that, that was for the court to decide. The fact is that even if the merits of the matter

were to be challenged, that ought to be achieved within time limits specified in the rules. In CO/130/HC/JL/5.5.87, another request for postponement was submitted and it was granted. In CO/131/HC/JL/5.5.87, the matter was postponed to 15 June, as there had been no return of service. In CO/134/HC/JL/5.5.87, when a request for postponement was made, the judge asked as to what had become of the urgency that was being claimed. No response was given. The judge then noted that he was reluctantly granting the postponement.

Some of these postponements were arranged in court, while other proceedings were in progress. One such instance was observed on 27.4.87, where 4 counsels were involved in a discussion as to whether one matter was to be postponed. I overheard one of them saying, "... unless you postpone the matter, I have no objection to that". They then all laughed. From the information obtained from the interviews, the main reasons offered to explain this situation relate to shortages in qualified legal practitioners which contribute to lawyers taking on too many cases, and then subsequently to their failure to cope with the work, or to appear in some of them thus causing delays, requests for adjournments and postponements. To this could be added problems of newly qualified lawyers having to take cases on their own without practical experience, due to lack of legal firms that could employ them, which in turn leads to failure to make adequate representations.

In CO/139/HC/JL/5.5.87, the counsel for the respondent showed that he was compelled to request postponement by a

week. He claimed that he had made certain investigations concerning the matter, and he would need to reflect the true facts. He made reference to additional documents he had submitted. But when the judge looked through his file, he could find no such papers. To this the applicant's counsel remarked, "No further facts have been revealed, Good Heavens!" In CO/173/HC/JL/5.5.87, the applicant's lawyer said: "I don't know whether Your Lordship has had time to read my heads. They were filed rather late." What he did not actually mention is that the papers were filed only that morning. When the judge replied that he had not, the Registrar passed the papers to him.

In addition to cases in which requests for postponement would be submitted, several other requests would be made for cases to be removed from the roll (Motion Roll). Frequently, this would also be because necessary procedures concerning papers, would not have been completed. It is important to recognise that this happens despite the fact that according to the rules, once the proceedings have been initiated, the subsequent stages must be completed within stipulated time limits. Thus the examples above indicate more practices which are inconsistent with the rules.

Many more examples could be provided to illustrate instances where proceedings could not carry on. But another significant dimension concerns the diversity of the reasons that led to the delays. For instance, in CO/67/HC/JK/23.3.87, uncontested divorce proceedings, the plaintiff had been in court for the whole morning. In the afternoon, the

court was informed the marriage certificate was yet unavailable, and that the law office had been requested to issue a copy of the original. From what I gathered, the certificate had been misplaced by the counsel in charge or rather his office.

In a further example, CO/71/HC/JK/23.2.87, it emerged only in court that the matter was being opposed. The counsel for the applicant was arguing that no papers for intention to oppose had been filed, and he was urging that the matter be proceeded with. He was in fact noting that he was unaware that the matter was being contested. The counsel for the respondent on the other hand, was arguing that in matrimonial matters involving such serious issues as divorce, cases cannot be allowed to proceed by default. He requested postponement of the matter by a week, to enable him to file the necessary documents. The counsel for the applicant went on to point out that his client works in the Republic of South Africa; and had requested leave of absence from duty in order to attend the proceedings. His further point of concern was that the case had been instituted in November 1986. By this he was intimating that there had been ample time for the other side to file its intention. In the circumstances, the applicant was allowed to give his evidence, since he was to return to his place of work.

Requests for postponement also occurred as a common feature in cases where the parties (usually one of them) are working in South Africa. In many of these cases, proceedings could not carry on due to delays encountered in

the service of papers. In CO/142/HC/JL/5.5.87, for example, it was noted that the notice of intention to defend was received on 30.4.87. It was argued that extra time was needed, in order to correspond with the defendant in the Republic of South Africa. The counsel for the applicant on the other hand, indicated that his instructions were now to request for the decision of judgement on the matter. In yet another case, CO/144/HC/JL/5.5.87, request was made for postponement to June 22, as the defendant was mentioned to be possibly somewhere in the Transkei, and he would need to be served with papers.

Almost similar instances to the above often occur in cases in which applications for bail are made. In CO/154/HC/JL/5.5.87, the defence counsel in stating the factors to be taken into account in considering the application for bail, mentioned that his client is married, with two children and that the family was largely dependent on him for support. He further argued that consideration should also be given to the fact that his client was acting in self-defence. The offence the accused was being charged with, occurred while he had come home for Easter holidays from the mines in South Africa. The judge asked the counsel whether he was aware that the application was actually going to free the accused from the jurisdiction of the High Court of Lesotho - "is that not difficult?" the judge asked. The assumption here was that if the bail was granted, the accused would return to South Africa. In response the counsel said: "I hope my learned friend will be sympathetic to this course

and not oppose my request, and let the children starve and the woman die". The crown counsel then raised the issue about the passport. It was finally agreed that an amount of M300 would be paid as surety for the passport and to guarantee that the accused would return to be present at the hearing.

In another matter involving application for bail, CO/163/HC/JL/5.5.87, the crown counsel indicated that the office of the Director of Public Prosecutions had sympathy with the case, and understood that the accused's means of livelihood were on mining. But he stated that surety was needed that the accused would attend the trial. Again in CO/164/HC/JL/5.5.87, the accused was noted to be the sole breadwinner for the family. The crown counsel in a similar manner noted that they had no problems with the application for bail, but went on to state, "my learned friend is, however, silent about the surrender of the passport to the Roma Police". The judge ordered payment of M100 for bail and surety of the passport. The issues raised in CO/160/HC/JL/5.5.87 were along similar lines. The crown counsel noted first that the amount permitted for cash bail is M100 not M50, but proceeded to say, however, "Mr Mda is also silent on the issue of surrendering the passport". These observations reveal the same trend in which one basic issue of passports is invariably not mentioned in the papers for bail applications, yet the counsels know it would unlikely be overlooked.

The issue of the passport also arose in

CO/23/TCM/MM2/11.8.87. In this matter, the hearing having been postponed to a later date, the crown counsel indicated her reluctance to hand back the passport to the accused. Thinking that the proceedings were over for the day, the magistrate asked what that was all about. Then the defence counsel said he was to make a formal application that the accused's passport be released, to enable him to carry on with his business. According to the counsel, his client's business activities had been strongly curtailed since 1986 when the case started. Further he noted that the accused was due to go to Botswana shortly, which would not be possible without a passport. He said the accused would not abscond. The magistrate, despite the crown counsel's qualms about the application, said "attempt should be made to balance the facts of life - employment and so on - with other factors, where people have to work in South Africa, not because they choose to." He then ordered that the accused should be lent the passport.

As illustrated in the following examples, in quite a number of instances, legal practitioners absconded from court proceedings in which they were to appear. For example in CO/80/HC/JK/3.3.87, the case could not proceed because the counsel for the accused was not in court. The judge warned the witnesses to attend the court on 11 August, as no messenger of court would serve them again. In CO/101/HC/JK/16.3.87, the case also had to be postponed again. The matter had been postponed on two previous occasions already, and on the second occasion, it was

mentioned that only the appellant attended. Now it was the counsel for the defendant who was not in court. The matter was postponed by a week. The same happened in CO/12/MCM/MM2/1.4.87, where a case had to be postponed because the defence counsel could not be found. Furthermore, in CO/172/HC/JL/5.5.87, the defending counsel and his client were not in court. Postponement was arranged with costs awarded the applicant.

In yet another case, CO/118/HC/JM/27.4.87, one of the counsel was not in court when it was called to proceed; yet he had been in attendance earlier. The one in court explained that the other had said nothing to him that day, "he ignored me". The judge asked him whether he had talked to the other counsel himself. It then emerged that the counsels had previously agreed to request for postponement to this date (27.4.87), in the meantime they would meet to arrange a settlement. The judge's concern was whether that settlement had been reached at all. As he put it:

I appreciate [your saying] that you cannot afford to run behind your colleague. But what will you say to your client?

An explanation followed that several appointments had been set to try and attempt to reach a settlement, but there was no success. The counsel proceeded to say "I'm spending so much money on telephones, and so on. Yet I have no problem with the matter, he's the one who's opposing it". The judge indicated that he was not interested in the costs being incurred. By this time the other lawyers in court were

laughing. The judge concluded, "what I do not like is the attitude of lawyers who are not able to talk to each other".

He urged that the opposing counsel should have at least remained in court to explain his position "he cannot hold this court at ransom". The matter was postponed by a week.

In CO/133/HC/JL/5.5.87, the respondent's counsel noted that, in view of the fact that the other counsel was not properly dressed, they were requesting for postponement.

This was followed by laughter from other members of the Bar.

The judge indicated that he hoped in future, the counsel concerned would "decide whether he's coming to a court of law" or some other place. But then what is surprising is that later on, the same counsel appeared dressed in CO/163/HC/JL/5.5.87. This time he was appearing for the applicant. My conclusion was that he was not prepared for the other case.

In CO/171/HC/JL/5.5.87, the only case of forgery that came up during the period of my field research, the counsel for the accused was not in court in the afternoon, yet like in one of the cases cited earlier, the counsel had been in attendance for the morning session. In addition, to the absence of the defending counsel, the case could not proceed for a further reason. The crown counsel stated that because of reasons beyond their control, his colleague, who had formerly appeared in the matter, was also not available. Furthermore, he noted that because of the nature of the offence, there were no witnesses. It also emerged that no hand-writing expert had yet been obtained for the case, the

only indications being that one from South Africa would be engaged, though he would only be available in December. The matter was, therefore, postponed to 1.12.87.

In addition to absences, legal practitioners would sometimes turn up late for the proceedings. A good example here would be from CO/23/TCM/MM2/11.5.87, in which the defence counsel was absent for the whole morning, only turning up for the afternoon session. The fact is that this counsel did arrive in the morning, but when he found the Magistrate and the crown counsel had not shown up yet, he decided to go away to attend to some other business. However, he went away leaving a message that the crown counsel should ring him on arrival. As the crown counsel was being given this message; the Magistrate overheard the discussion. He, therefore, enquired as to who was the defending counsel. When he was told who it was he immediately remarked, "God the Father, he'll say he's busy".

This tended to suggest, perhaps not only with regard to this particular lawyer, that often such excuses are common for legal practitioners. The crown counsel did not ring the defence counsel in this instance, she only made a complaint saying: "This is just like them [lawyers]. They like setting dates for their cases, and later turn to claim they are busy". Finally the magistrate decided he would ring the defence counsel himself; because he felt it unfair on the witnesses who were in attendance as duly summoned. The descriptions about what happened when the defence counsel finally arrived in the afternoon are made later.³⁰

In addition to the above observations, I was able to record instances which suggested that legal practitioners are themselves not so able to handle the rules of procedure and evidence, as it may usually be assumed. In the following examples, one sees the legal practitioners facing problems in using the rules. In CO/107/NC/JM/18.3.87 as mentioned elsewhere,³¹ the judge and the defence counsel had illegible copies of the post-mortem report. What complicated things even further was that the judge was resistant to accept the facts stated in the report as valid evidence, because from what emerged, the doctor who had performed the post-mortem had not appeared at the Preparatory Examination. That alone was an instance of failure to abide by the rules, not to call one of the chief crown witnesses to court. But it was the indication of the crown counsel that he would abandon the case, which raised the debate pertinent in the present descriptions. The counsel for the crown intimated that he would not follow the alternative procedure suggested by the judge, which was to obtain a sworn statement of the doctor. When the defence counsel heard this, he immediately proceeded to make an application for the accused to be released. As noted earlier a long debate ensued between the two counsels, until the judge intervened, showing what correct procedure would be under the circumstances. He stated that it would not be necessary in this instance, for the crown to prove beyond reasonable doubt that the accused was guilty of the offence. Rather what would be looked for would be whether the crown had been successful to establish a *prima facie* case

on the basis of other evidence presented; despite the non-availability of the doctor's statement. In other words, the case would not be automatically dismissed because the doctor's report would not be accepted. Thus the application of the defence that the accused be discharged was premature at this stage.

In CO/155/HC/JL/5.5.87, it was noted that no opposing papers (notice of intention to defend) had been filed. A request for summary judgement on the value of M3,000 claim; plus interest and costs was, therefore, submitted. But the counsel for the party against whom the claim was being made, indicated that they (him and his client) were requesting postponement until the case of Mr Masoabi (client) as Attorney had been dealt with. This as it was revealed, pertained to whether Mr Masoabi was to be struck-off the Roll of Attorneys; never to be allowed to practice. The judge pointed out that, "we're not here to determine Mr Masoabi's fate at this juncture". The judgement was granted as prayed. The point is that the counsel for the respondent was confusing issues relating to two different cases. The matter before the court at the moment was in respect of the claim referred to above. That was what the court would presently address. A similar fact was picked from the proceedings in the Court of the Judicial Commissioners. In CO/4/JCCQ/JCS/3.6.87, the counsel for the appellant was not arguing about the right to inheritance, which was the cause of dispute in the matter before the court. Rather he seemed to be questioning the allocation itself.³²

A further example relating to the argument about legal practitioners' uncertainty about the rules of procedure and evidence, was observed in CO/173/HC/JL/5.5.87. It appeared that there were two applications as contained in the founding affidavits and the counter-affidavit, and the suggestion was that the two be merged. The judge having listened to the applicant's lawyer, pointed out at a number of difficulties in the affidavits. For instance, the judge said it was difficult to work out who the various respondents were from the affidavits. He noted that there were two supporting affidavits to the counter-affidavit. Finally, that the counsel for the applicant was said to be raising too many technicalities in the affidavits. Basically, there was confusion in the manner that the affidavits had been prepared. Having spoken on the various difficulties, the judge proceeded to ask the defending counsel whether she wanted to respond. She replied in the affirmative; going on to point out that she wanted to raise points "in limine", before she could carry on to the arguments concerning the facts of the case. On hearing this the judge asked: "what gives you the impression that we will proceed to the merits of the case?" That was followed by an argument concerning the dates on which the various papers were filed. The main cause of concern was that, not enough time was given for the return of service. In addition, the counsel for the respondent noted that no resolutions were attached to the founding and counter-affidavits. In return, the applicant's counsel stated: "a well prepared resolution is only half A4

size sheet, as opposed to the voluminous paper that my learned friend has prepared".

In CO/3/HC/JM/12.2.87, the problem concerned the way the case was presented to the court. Again the relevant papers had not been drafted properly. While one would expect that such a problem would occur mainly where the applicant is appearing on his/her own, in this event the applicant was represented; yet the papers did not bring out all essential facts to the court's notice. This kind of problem appeared phenomenal in a vast number of proceedings that were observed. But as reflected in CO/6/HC/JK/9.3.87, the problem is not only with how to draft the papers correctly and with what facts to include, but where people are not represented it is also with what papers to file. In this matter (divorce proceedings) when the plaintiff (wife) was called, a man, whom as it latter emerged, was the husband (respondent) also stood up. The judge asked him who he was "joale uena u mang?" The man explained himself, making a statement that he wanted to oppose the matter, but the point is that he had not filed the opposing affidavits. Although it latter appeared that the man had done the same on a previous occasion when the matter was before the court, and that he was offered advice to seek the assistance of the legal aid, he might have genuinely not known how to handle the situation. He argued that he had not been informed on that occasion about how to acquire legal aid assistance. The man was finally told to sit down and the judge ordered the proceedings to continue pointing out that the defendant

could apply for a recision later on. This was said in a very low voice, I doubted whether the man heard it. But the point is that even if he did, it is doubtful if he would have known what to do.

In CO/23/TC/MM2/14.5.87, the accused was charged with culpable homicide. The magistrate had just finished reading the charge in Sesotho, when the crown counsel indicated that she had not followed the reading of the charge properly. Then the magistrate read it over again, this time in English. The crown counsel then requested the court's permission to make an addition, or to amend the charge. The magistrate said the proceedings had not actually begun, and since the accused had not even pleaded, he supposed the defence counsel would not object to the amendment. At this point, it emerged that the defence counsel did not even possess a copy of the charge sheet. When the adjournment had been allowed for the prosecution time to amend the charge, the magistrate made a comment to me in private, that similar requests are very common and that often this offers the defence a good chance of arguing the case on technicalities of procedure. He went on to say:

As I was reading the charge, I could see the prosecutor shrugging "a ntse a tsitsipana". That is why I decided to read it in English.

The amended charge gave 3 counts, one of which read: "Failure to produce a licence to authorities". The magistrate asked: "who are they? The police, I believe so". Then he went on to state his annoyance at the delays

that had been caused in the proceedings of this case. He complained angrily of the defence counsel's failure to turn up for the morning session, and also pointed out that the prosecution had also taken extra time, with its request to amend the charge sheet. There was not sufficient time left to complete the case on the same day, and the matter was postponed to July 13th, 1987. It appeared the matter had already been postponed several times prior to this.

The overstatements about the facts in the evidence are not only confined to the ordinary people. In CO/3/TC/MM2/14.5.87, the proceedings having been postponed to a future date, the defence counsel made an application for the accused's passport to be handed back to him in the meantime, since the accused's scope of business had been strongly curtailed since 1986 when the case started - without a passport he could not engage in business outside Lesotho. The Crown Counsel appeared not to be in favour of this application, pointing out that a police should be asked to release the passport, as she would not personally do so. In addition, she mentioned that the accused had on previous occasions failed to come on remands, and that she also had received ("heard") information that the accused had been to the Republic of South Africa. This last point appeared to constitute unsubstantiated evidence. The request of the defence was honoured.

In CO/6/TC/MM3/24.3.87 the problem was with the manner in which the question itself was constructed. The defence counsel asked: "this place next to Makhotsa's, is it a place

you know?" The magistrate said he was not clear as to what the question was in aid of, he then proceeded to rephrase the question himself³³ as follows: ... is it a place you are quite familiar with? This is a further indication that problems regarding such rules as those pertaining to cross-examination are not only peculiar to the ordinary man, but are faced by the court personnel too; including the lawyers who could be presumed to be more familiar with the received law and its rules of procedure and evidence by virtue of their legal training in them. The examples provided below demonstrate this problem even further.

In CO/79/HC/JK/3.3.87 for instance, the defence counsel was warned several times by the judge not to ask leading questions. The judge repeated this warning on several occasions. In the same proceedings, the crown counsel raised an objection that the defence counsel could not let A4 correct what A2 had said in his evidence regarding the order in which all accused persons left the police station. In CO/104/HC/JM/17.3.87, the judge on several occasions asked the defence counsel to rephrase his questions. The same counsel also confused A1 as A3, thus consequently confusing the witnesses during cross-examination. On another occasion, the crown counsel on examination-in-chief asked PW4 to identify the exhibits (weapons) that were alleged to have been used in the offence. The judge stated that it would first be appropriate to find out (establish) from the witness whether she could describe the weapons before asking her to identify them. These few examples do point out that even

the legal practitioners themselves face difficulties in making use of the received law rules of procedure and evidence. In CO/6/TC/MM3/24.3.87, the magistrate had to warn the defence counsel to ask "one question at a time". It also appeared that the counsel was being too fast for the magistrate who had to write the proceedings in longhand.

A further observation concerning the failure of legal practitioners to comply with the rules was revealed in CO/104/HC/JK/17.3.87, whereby the crown counsel having called two of the witnesses for examination, intimated to the judge that it was already 12.35 and that it seemed they had run out of time. The judge pointed out that the lunchbreak only starts at 12.45. At that juncture the crown counsel revealed that actually he wanted an early adjournment because he needed time to interview other witnesses. As he explained the witnesses had arrived late the previous day and he had had time to interview only two.³⁴ But the judge pointed out to the prosecutor that:

You don't need to interview them. You ought to have been briefed. You do have their statements, don't you.

The crown counsel agreed, however, he added that he needed "to get further explanations on some of the issues. I need to talk to them first." The judge then said: "I don't like these explanations". The question here is whether the advocate here had been adequately and accordingly instructed by the attorney as the rules provide. But the description above also raises the question whether the crown counsel was actually prepared for the case.

From the descriptions made so far, it is obvious that most of the examples discussed come from the proceedings of the received law courts. This is because legal practitioners appear more at that level of the court structure. In another sense, this could be taken to represent a feature distinguishing between the received law courts on the one hand, and the customary courts and the "unofficial" chiefs' courts on the other. The observations concerning practices of legal professionals as discussed above, are not so characteristic of the latter two sets of courts. However, it is important to demonstrate what happens in the Judicial Commissioners' Court; where as mentioned once before, legal practitioners to some extent appear more than in the other customary courts.

One of the arguments referred to earlier, is that many of the informants whom I interviewed,³⁵ hold that it is preferred that legal practitioners should not appear in the customary courts, despite the fact that the law provides for legal representation in criminal cases. As illustrated by Judge Molai, for example, the fear is that legal practitioners might introduce complicated aspects of the accusatorial procedure and rules of evidence, which the people and the customary courts personnel are not familiar with. Consequently, it is held that, this would cause confusion in those courts. The idea, as argued by the Chief Magistrate, is that the people should be left to settle their disputes as they see fit; without introducing complex concepts of legality into the customary courts. The

implication is that if legal representation becomes practised in the customary courts lawyers would tend to bring in complex issues of the law and procedure, which, as discussed earlier, are not central to the proceedings in these courts even in the present day. In fact, as also already demonstrated, legal practitioners themselves are reluctant to appear in the customary courts because they recognise that proceedings in these take a different approach from that prevailing in the received law courts, towards which their training is tuned. Hence the perception that the customary courts are not proper grounds for trained lawyers.

From one viewpoint, the next examples support the allegation that where involved, legal practitioners tend to introduce complex technicalities of law and rules of procedure and evidence into the proceedings of the customary courts. This becomes evident when one looks at the kind of questions raised by lawyers, most of which centre on points of law, which seldom feature in the proceedings of the Central and Local Courts. In another sense, these examples reveal what has already been stated regarding common practices that surface in cases where legal representatives appear.

These descriptions focus on the fact that in cases where legal practitioners are involved, proceedings in the Judicial Commissioners' Court are often conducted in the English language. With regard to the High Court and the Magistrates Courts this point was discussed at length in the previous chapter.³⁶ Again, the issues discussed with regard to the

use of English in the proceedings is connected to the fact that the procedures of the adversarial model are, in this context, of foreign origin. The point is that many Basotho people are not adequately conversant in the English language, let alone with the legal language; which has concepts the ordinary people are not familiar with. The latter raises a similar point to that made in the works of Ericson and Baranek (1982); Mueller (1970); Carlen (1974); Berger and Luckmann (1966); Atkinson and Drew (1979) and others, that legal discourse contains concepts that are not included in the everyday language of the people. In this event as already pointed out, the situation is complicated even further by the use of a foreign language - English. Of course, this adds on to the fact that the adversarial approach being of colonial heritage, the rules of procedure and evidence and the law generally are written in English.

The complications that result from this are discussed in the context of examples taken from court-room observations in the Judicial Commissioners' Court.

One of the distinct features is that, while in the High Court full-time interpreters are employed, in the Court of the Judicial Commissioners, the court clerks are the ones who undertake the role of translation, in the proceedings where legal practitioners are involved. In CO/4/JCCQ/JCS/3.6.87, the counsel for the appellant went on for a long time outlining the "thrust" of the case. At some point, the Judicial Commissioner interrupted asking whether the counsel did not mind going on without his client hearing what he was

saying. This was because the counsel had carried on for a long time, not allowing the court clerk to interpret what was being said into Sesotho, mainly for the benefit of the appellant. When later, issues were raised about the confusion regarding the number of witnesses who had appeared before the Local Court, discussions between the Judicial Commissioner and the Counsel went on in English, as they referred to the papers before them. In referring to the appellant before the Local Court, the court clerk called him the "appellant", and was corrected by the Judicial Commissioner saying "it should be 'plaintiff' because I am referring to the first instance hearing". The use of Latin phraseologies also seemed to confuse the court clerk. For example, she failed to translate "res judicata", and finally had to be assisted by the counsel for the respondent who pointed out that it refers to "ho tsosa nyeoe sepoko (bocha)". Several of these Latin phrases were used in the proceedings of this case, and each time they seemed to confuse the court clerk even more. She had to be helped to translate "locus standi" into Sesotho as "boemo [ba motho] nyeoeng". At another point, the court clerk wanted to translate what the counsel for the respondent had said in Sesotho into English, for the benefit of the other counsel. The Judicial Commissioner stopped her, saying that the counsel was following the argument. In other instances, the court clerk would simply repeat the words used in the English version. Such applied to words like "findings" and "principles". With regard to the former, she had to be

corrected several times, the Judicial Commissioner indicating to her that it refers to "liphumano" in Sesotho.

One other interesting aspect that arose during the proceedings of the above case, was when at one juncture the counsel for the appellant raised the point that the case had been dealt with by a layman (i.e. at the court of first instance), and that as qualified professional lawyers themselves, they had to argue the points of law. However, the other counsel intervened pointing out that "my friend should respond to my arguments and not raise a fresh argument". This was equivalent to pointing out that the appellant's counsel was now getting out of procedure. The counsels then engaged in a long debate. Finally, the Judicial Commissioner warned them that each had been given a chance to make submissions, and that all they had to do now was to respond to such.

In CO/5/JCCQ/JCS/3.6.87, to begin with the counsels were not sure as to which one of them was appearing for the appellant, and which one for the respondent. One of them in the end noted that he had not actually touched the file, since he was not aware that the matter would be dealt with on that day. On the concurrence of both counsels, agreement was reached to postpone the matter to 8.6.1987. Similar delays were noted to be phenomenal in the received law courts, in particular the High Court.

In CO/6/JCCQ/JCS/3.6.87, the respondent was not represented and in her own words she stated: "Ke mohlolohali oa Molimo ea senang mang oe". By this the woman was

acclaiming her status as a widow with no one to turn to for help, and by implication also suggesting that she could not afford the costs of employing a lawyer. The counsel for the appellant started his argument on a point of law. He said it appeared there was confusion over when the 1979 Land Act actually came into operation. His conviction was that it began to work in 1981. In addition, he raised the issue whether the respondent's husband had in fact died, and if that was the case, he wanted to know exactly when he died. In this, the counsel was trying to assess whether the respondent being a woman, had the legal right to be appearing in the matter. Furthermore, the counsel claimed that EXHIBIT A (a letter) did not show that the Principal Chief was chairing the land allocation committee, as its rightful chairman. He stated that there was no evidence to prove this fact, and complained further that the records from the lower courts were not clear.

During the proceedings of the above matter, or at the beginning rather, the assessor had been asked to recuse himself due to his previous involvement in the matter at the time he was still President of the Central Court concerned here. The counsel for the appellant had actually appreciated the Judicial Commissioner's move to exclude the assessor from the current proceedings. But then as they carried on, the counsel kept on making reference to the "assistant" of the Judicial Commissioner. Ultimately the latter had to indicate that "I have no assistant". Because the discussions for a long time had been between the Judicial

Commissioner and the counsel, at one juncture the former had to explain to the respondent that what they were arguing about were points of law. He mentioned that he did not quite know how he could explain the whole argument to her, but said where necessary he would attempt to do so.

The points raised by the counsel, as described above, were strictly on points of law and procedure. Without legal representation the respondent found it difficult to address herself to them. Instead she went on to relate that the matter dated back to 1980, and how the chief had taken part of the field. She also talked about the "Form C" which she said she had no knowledge of, and so on. I believe it is because of the circumstances concerning the respondent's lack of representation, by virtue of which she failed to respond to the points of law the appellant's counsel had raised, that the Judicial Commissioner decided to act cautiously and remanded judgement for a later date to be arranged.

In CO/13/JCCS/4.6.87, again only the appellant was represented. The court clerk who was doing other duties in the office, was called in for translation. However, before she could accept, she asked who the counsel concerned was. Having been told who it was, she remarked: "since when doesn't he know Sesotho?" When finally the court clerk did turn up, the counsel had been going on attempting to speak in Sesotho; but he consistently mixed it with English. For example, he would say: "automatically liability ha e tle" (liability does not automatically follow); "ha ho na le suggestion feela" (when there is a slightest suggestion);

"conditions tse sekete"; and "ke beha case for recession to the court of first instance" (I submit that the case be receded to the court of first instance). Most of these also possessed legal technical connotations. This explains why when the respondent stood up to make his submission, he started by specifically stating that he would only respond to the "things" he had heard; "others were said in English, and I do not know the language". The Judicial Commissioner at that point gave a summary of the arguments raised by the appellant's counsel, noting that the suggestion was that the case be remitted to the court of first instance, because it had not been adequately proved at that level. There was conflicting evidence in the statements of the party (now respondent) and those of his witnesses.

CONCLUSION

As mentioned at the beginning of the chapter, the main aim was to make an assessment of the position with regard to legal representation in Lesotho and to examine how the adversarial principles are applied in cases where legal practitioners are involved.

From the descriptions that have been made, it is quite evident that the provisions for legal representation which currently apply, fall short of ensuring that the majority, if not all, of the people who appear before the courts and possess no knowledge of the law and no skills of advocacy are represented. The legal provisions themselves do not make legal representation a general feature of all the courts; so

do legal aid and Pro Deo provisions, the latter only being available for cases in the High Court. For the Central and Local Courts, justifications have been that the proceedings in them do not require much legal expertise and skills of advocacy. This seems to work against the allegation that the official courts are adversarial, which also confirms that this exists more in theory, than in practical reality.

The real fact is that legal representation is not a common feature in the customary courts, though some people do appear represented in the Judicial Commissioners' Court and the Roving Stock-theft Central Court, but even then this is to a lesser extent than in the received law courts. At the level of the received law courts, according to indications by the Chief Magistrate, even in some of the most serious criminal cases processed through the Magistrates Courts, a good number of people still appear unrepresented, so that it is in the High Court where legal representation appears guaranteed.

The main assumption from which I was working, is that in view of the changes that have occurred with regard to the rules of procedure and evidence mainly, legal representation would be justifiable, and legal practitioners by virtue of their training in the received law principles; would assist in ensuring that the adversarial rules are adhered to. However, as the descriptions in the foregoing sections do indicate, the issue is not as simple as that. The examples of legal practitioners in action as described in the last section reveal their failure to abide by the rules, pointed at by their absconding from proceedings, turning up late, not

dressings properly and so on, and these are coupled with their duplicitas behaviour in which many of them do not give serious consideration to responsibility towards the client. In addition, instances revealing legal practitioners' failure to abide by rules are represented in failure to present the facts of cases properly and adequately, failure to draft papers appropriately, not preparing papers in time, which in turn leads to delays in the service of papers, consequently to postponements, adjournments and cases being struck-off the roll.

But in general, it is the delays which become the prominent feature in cases where legal practitioners are involved. The view expressed here is that other than these constituting manipulative practices, they are more connected to practical conditions relating to the position of the legal profession in the country, which give rise to a number of complications, and defeat the aim of implementing the accusatorial rules. These include shortages of qualified lawyers, insufficient numbers of well established legal firms, the concentration of legal professionals in the capital and engagement of inadequately experienced lawyers in courtroom proceedings, as a result of the reluctance of established firms to employ newly qualified practitioners. As witnessed from the courtroom observations, in the majority of cases the lawyers who appear are almost the same every time. This happens for all the various courts. These are the ones who are already established, sometimes with their own legal firms. What happens is that these lawyers have

too many cases than they can possibly handle, consequently the experienced lawyers get all the work than they can thoroughly prepare for, draft all the necessary papers, contact their clients, liaise with fellow practitioners and so on. As the Chief Magistrate indicated, the legal profession has become more of a business than a service to the people. In addition, the inexperienced lawyers work on their own, without supervision or guidance of practitioners who have done court work for some time.³⁷ This does not mean that the latter are always conversant with the rules either, in some of the examples used in this analysis, they also time and again failed to work according to the prescribed guidelines.

Finally, it can be argued that even with legal representation, the rules of the adversarial model are still not fully complied with, principally because again we are dealing with the application of the model in a non-western setting, where the prevailing conditions within the judicial system and the social environment, are of a different kind. On the whole, the descriptions pointing to the delays, touch upon the issue of an insufficiently developed legal profession, which in itself is connected to the fact that the concept of legal representation is also alien in this context.

CHAPTER 7

CONCLUSIONS

I began this thesis by introducing the reader to the history of legal and judicial development in Lesotho, in an endeavour to explain how the present complex system of dispute settlement processes, including both the "unofficial" Chiefs' Courts and the official courts came into being. The descriptions in this regard (Ch. 2) may seem to have been rather lengthy, but my intention was to provide an analysis of the events that accompanied the introduction of an alien system for the settlement of disputes because it is my belief that such kind of knowledge would lead to a better understanding and appreciation of the coexistence of mechanisms of various origins and how they operate in the present day. Snyder (1980) asserts the necessity of historical understanding of the organisation, concepts and processes of contemporary legal systems especially in studies of legal pluralism.

The descriptions contained in this thesis have worked at two interrelated levels. First at the constitutional level, spelling out the character of existent judicial processes and exploring the organisation, ideology and philosophy of the various methods of dispute settlement, assessing whether the notion of a dualistic and parallel judicial structure brings us closer to understanding all

the intricacies involved. Secondly, at the level of describing how dispute settlement is carried out in practice. The two are interrelated in the sense that the latter is approached through the conceptual framework acquired in the first. My intention now is not only to summarize what has gone on before, but also to reflect a little upon the significance of my arguments, extending some of the issues to show what effect they have had on the developments attempted in recent years.

In the historical context, we saw how attempt was made by the colonial administration to ~~deprive~~ the chiefs of judicial powers which they had been exercising concurrently with the administrative, political and other duties. For many years the Basotho resisted any kind of reform that threatened their form of organisation and methods of dispute settlement. However, as time went on the laws and customs of the Basotho and their indigenous mechanisms for dispute settlement were made to apply only in limited circumstances. This includes efforts such as the introduction of Magistrates' Courts during the period while Lesotho was under the Cape Colony, which in any case left many kinds of disputes except the most serious ones in the hands of the chiefs. When the British took direct control over Lesotho in 1884, they revived the system of Magistrates though as we have seen the chiefs continued to deal with disputes of various kinds involving their people as they had before. From 1938, however, the customs and

laws of the Basotho people came to be recognised only if enforced within the newly established customary courts structure whose creation became entangled with the colonial administration, and this invariably meant their sudden and bewildering enmeshment into the received law and judicial ideology and philosophy. Similar historical developments have been observed in other African societies, for example, by Allott (1984, 1985); Woodman (1985); Roberts (1972); Chanock (1985) and others.

The customary courts structure as argued earlier was supposed to replace the courts of the traditional authorities - chieftaincy - as they existed under the indigenous system. But the evidence that has been presented demonstrates that the latter were only relegated to an "unofficial" status, though in practice they function in close relationship with the official customary courts. With perhaps the exception of jurisdiction in terms of types of cases handled, the "unofficial" chiefs' courts maintain principles which guided the courts of traditional authorities in pre-colonial times.

The symbiotic relationships and the complementary fashion in which the "unofficial" chiefs' courts and the customary courts have been demonstrated to function, lead to the conclusion that at the practical level, the former are not as "unofficial" as may be presumed. This perception becomes even stronger when taking into consideration indications by members of the legal

profession in the received law courts; recognising the validity and crucial role of processes in the chiefs' courts in promoting reconciliation, others even going further to show the chiefs' courts as a necessary and acceptable way of doing things. If the "unofficial" chiefs' courts constitute the normal way of doing things, then it means they form an additional set of courts to the ones presented as part of the dualism; namely, the customary courts and the received law courts. Thus the assumption that depicts dispute processes in Lesotho as consisting of two streams is not only insufficient but serves to entrench the legal centralistic notion (Griffiths, 1979; Galanter, 1981), mentioned in the introduction.

The relationships between the customary courts and the "unofficial" chiefs' courts are so strong such that the procedures and rules of evidence in the latter have become very influential on the proceedings of the former. What I have argued is that this contradicts the allegation that the customary courts are *adversarial*, except perhaps in terms of the fact that the presiding officers are appointed, that they have court clerks and messengers and that they have to keep records of proceedings and observe regular working hours. The issue is that there are rules of procedure and evidence written down for the guidance of these courts which as Maope (1986) noted are simplified *adversarial* rules. However, in practice these are not

adhered to in the Central and Local Courts, a situation facilitated by the simple fact that the personnel have no knowledge of principles of the adversarial model. An additional factor is that the personnel and the people in general are more acquainted with the conduct of proceedings in the "unofficial" courts, and for most of the time these are the ones that influence conduct in the customary courts. To borrow from Werbner (1980), it is the expectations and ideas of the clients' experience of something else that they bring to bear, making the customary courts work along principles of consent, consensus and reconciliation - seeking processes as it happens in the "unofficial" courts of the chiefs.

In other words, there is an interaction of norms across boundaries of the various forums, so that the norms that operate them are not confined to a particular system, but are drawn from a number of sources (cf. Griffiths, 1987) producing a fusion of values drawn from both the "unofficial" courts and state-recognised customary courts.

Also this represents the vision of Von Benda-Beckmann (1985) of how within village contexts the villagers' normative systems are reproduced in a way that makes them meaningful to the everyday activities and processes of decision-making in the village - in this case dispute settlement processes - producing systems different in form, structure and content from those that were being created. The most influential factor in this "reproduction" process

is the importance attached to the maintenance of harmonious relationships among neighbours within the village context.

This makes it less possible for one to push his individualistic claims, as it would be in an industrial society. This, in turn, influences the expectations of people even in dispute settlement processes, those within the village being predominantly community-oriented and viewed as relevant by most Basotho, as against the individualistic approach of the received law.

That the Central and Local Courts do not work according to adversarial rules seems to be a widely known and accepted fact, further confirmed in that provisions for legal representation in these courts are made in respect of criminal offences only, at the exclusion of civil cases which form the majority of matters heard by them. But even where criminal offences are concerned, legal practitioners are not enthusiastic to appear in these courts with the exception of cases coming before the Roving Stock-theft Central Court. This occurs for similar reasons as those advanced in Werbner (1980), that the interpretation and application of western state law by villages is not regarded as a proper legal process. The whole situation is justified by arguing that proceedings in these courts should be maintained simple to keep them in line with the level of understanding of the personnel and people who make use of them. In addition, arguments that the numbers of qualified legal practitioners are

insufficient have also been used. Thus exposing them more to influences of procedure adapted from the "unofficial" courts.

The position in the Judicial Commissioners' Court is somewhat different though not to any significant extent. At this level of the customary courts structure as we have seen, more consideration is given to the adversarial rules. But the process is complicated by the fact that this is an Appeal Court relying mainly on records from the Central and Local Courts, which as we have realised are usually not well written. Recognition is usually given to the fact that under the circumstances pertaining to the kind of personnel in those courts, proper recording of proceedings cannot be expected; implying also that it has to be excused. The point being argued is that this, however, frustrates the attempts of the Judicial Commissioners' Court to enforce the rules of the adversarial model. Since at this level of the customary courts structure legal practitioners are given the right of audience in both civil and criminal proceedings, where parties appear represented the proceedings do tend to take a different trend signified by legal practitioners' tendency to raise points of procedure and of law quite often. Again this happens in a minority of cases and results in a number of complications as demonstrated in the examples picked from some of the proceedings that were observed in this court, pertaining to delays, failure by

legal practitioners to attend the proceedings, their tendency to use the English language and so on. On the whole, the conclusion that can be reached here is that one sees a system failing to work according to rules meant to guide it, instead the procedure of the adversarial model is consistently redefined within the context of prevailing constraints.

At this juncture it may be useful to reflect on the impact the practices summed above have had upon attempts undertaken to reform the customary courts structure in recent years. In the main, the descriptions that follow reveal some uncertainty about the direction in which the customary courts have to be developed. Despite widespread evidence about practices in these courts over the years, attempt was made to draw the Central and Local Courts even more into the adversarial model. The need for perhaps more strict rules and the move to change the "traditional" outlook and personnel in these courts has been generally supported both on professional grounds, and on the demand that there is a need for the integration of the court system as a whole in the interests of effective administration of justice and of national unity. The need to unify the court system and to codify the laws was mentioned, for instance, by the Director of Public Prosecutions. The initiative along these lines came in the early 1970's from the Ministry of Justice, through which several of the lower customary courts were elevated

to the status of the Magistrates' Courts. For example, the Acting Chief Justice in an interview stated the Tsifali-Mali, Matsieng and Maqhaka Local Courts were upgraded in this manner. As he further explained, these courts actually came to operate like Magistrates Courts. People from the village who came to the court saying that they wanted to sue were told to get the services of a lawyer. The people could not understand and an individual would for example say:

No, I can't do that. I haven't got money for a lawyer. This is a simple thing [matter]. I want this - this field belongs to my grandfather, I know it, so why do I need the services of a lawyer (Kheola: 16.2.1987).

In the words of the Acting Chief Justice, the attempt "failed hopelessly. In fact it never started. They put magistrates there; but no single case went there except criminal cases". The integration attempt failed because the procedure which was introduced became too difficult for the people, and different from that they are accustomed to in the Central and Local Courts.

The Chief Magistrate stated that the above attempted reform caused serious problems for the people "because they were denied their custom and practice they are familiar with". The following is an example of what would happen as given by the Chief Magistrate. In a dispute about a chicken, for instance, a person would be asked what its value is. If it costs M10, the court fees alone would

amount to more than that in terms of revenue stamps. In his own words:

Where would you get a revenue stamp, supposing you are at Ha Marakabei, because you can only obtain it at the sub-accountancy? (Matete: 8.5.1987).

The above example goes to show the extent of complications that would result, if the customary courts were to be abolished in the manner it was intended as part of the effort towards the integration of the judicial structures.

As the Chief Magistrate further stated, the attempt would end up in "messing the customary law system". It is important to note that the attempt was only concerned with the official courts structures, and while there is a wide recognition of the existence and functioning of the "unofficial" courts structure, no attention was given to them.

The contention here is that the major reason for failure to take the "unofficial" chiefs' courts into account in the above reforms, lies in the reluctance to come to terms with the practical reality that first, a number of disputes never come to the level of the customary courts. Similar observations that most disputes, including both civil and criminal matters, which under rules (of the United States) could be brought to the courts are never placed on the agenda of any court are made in Galanter (1981). Secondly, that in the eyes of many

Basotho, the "unofficial" courts still represent the proper forum for dispute settlement additional to the official courts. The "unofficial" chiefs' courts constitute a distinctive social arrangement with its own rules and familiar procedure different from the adversarial procedure, and which because of the significance attached to them and their meaningfulness within the village setting have come to infiltrate proceedings in the customary courts. The consensus and community-oriented approach of dispute settlement in the chief's courts is seen as appropriate and most relevant to the ends that a village hearing seeks to achieve - mainly to ease strained relationships. The arguments made so far lead to the conclusion that not much success has been made to supplant the indigenous courts with the official customary courts, rather the two function as extensions of each other in a mutual relationship influenced highly by cultural expectations of the people regarding dispute settlement.

The failure of these reforms seems to have been welcome to some extent, and this becomes evident from the justifications given in its support, such as the lack of resources on the part of many people for obtaining legal representation, and that the system would be beyond their understanding. Judge Molai indicated that he was himself in favour of the integration, as a way of shortening the process of appeal in the customary courts. But as he further explained:

Arguments are very strong against that [integration] and I didn't shed tears when it did not work although I had wanted it to (Molai: 4.3.1987).

The position of the customary courts and the appreciation of their "simplicity" of procedure were thus left in a strong position. Even the already upgraded courts reverted to their usual status, following the failure of the experimentation. One could conclude that it was deemed better to let the customary courts continue in their normal practice, than to complicate issues by forcing them to operate in the similar fashion to that in the Magistrates Courts. The significance of this in the context of this work is that, effectively it means the customary courts have been left to function in a manner similar to and in close relationship with the "unofficial" chiefs' courts in terms of relaxed procedural and evidentiary rules, drawn away from the received law model. The jurisdiction of these courts is, however, limited to non-indictable criminal matters and to civil cases involving mainly the customary law and other minor statutory provisions such as compensation for injury, damage to property and land disputes.

Within the official courts structure, the customary courts and the received law courts are set apart from each other in a number of respects. First is the fact that the customary courts are concerned mainly with the application of the customary law, while the latter primarily administer

the received law. Another important element in spelling out the relationship between the two, is that the latter occupy a position of seniority over the former as demonstrated by factors such as the revisionary and powers of control the Magistrates possess over the Central and Local Courts, the appeal cases from the customary courts ending up in the High Court and the Court of Appeal, the received law courts having wider jurisdiction geographically and handling most serious cases and having greater sentencing powers. This suggests that the customary courts are subordinate to the received law courts generally, but in turn the Magistrates' Courts are subordinate to the High Court, leading to the conclusion that even within the received law courts structure alone, one cannot speak of the parallelism of various courts, rather of a hierarchically ordered judicial structure. Nor could such a relationship be said to exist between the received law courts and the customary courts, let alone extending it to describe the relationship between the latter and the "unofficial" chiefs' courts. The customary courts as described earlier, for all practical purposes are regarded as appeal courts for cases which cannot be settled or which prove beyond the capabilities of the "unofficial" courts.

Furthermore, from the descriptions that were made the application of the adversarial rules is more visible within the received law courts structure than in the

customary courts. This is reinforced not only by the fact that the judges and the majority of the magistrates now possess training in the rules of procedure and evidence of this model, but also by provisions which grant legal practitioners the right of audience in civil and criminal cases equally. In the High Court this is further illuminated by provisions for pro deo and legal aid services, all of which promote adherence to adversarial model. From these it can be expected that in practice legal representation is guaranteed for all cases coming before the High Court. In practical terms, legal representation is almost mandatory in civil cases both in the Magistrates' Courts and the High Court because of procedural requirements which ought to be satisfied in instituting proceedings, which as demonstrated earlier, individual parties would not be able to handle on their own. However, as we noted in CO/6/HC/JK/9.3.87 some people still come before the received law courts unrepresented, either because they have no means of acquiring such assistance or because of their lack of knowledge of how to acquire it. The issue becomes even more complex because the legal aid provisions as we noted are fairly inadequate.

In criminal matters before the Magistrates' Courts on the other hand, many accused, as earlier descriptions indicate, still appear unrepresented even in most serious cases. But even where represented such assistance comes

at the trial stage. An additional factor is that prosecution in the Magistrates' Courts is mainly in the hands of public and police prosecutors whom besides their work experience, do not have training skills in the adversarial principles. So that in the vast majority of criminal prosecutions, the Magistrates act as the only knowledgeable people coming into contact with the cases and hence have to wear "the many hats" (El-Naiem, 1978), which means they do not act only as impartial referees as expected under the adversarial model, rather they constantly have to supervise and direct police prosecutions which while not equivalent to actually assisting them to prepare cases for prosecution, it involves looking to see if there is a case. In other words, the Magistrates have to assess the sufficiency of evidence or whether more evidence in support of the case for the prosecution is to be allowed. They supervise the work of the prosecution and as some of the descriptions reveal, of the defence as well. We have also seen how in many cases they have to partake in cross-examination, all these, are in addition to their role in trying cases. On the whole this shows how the Magistrates have to be able to shed the role of the prosecution-adviser and assume those of the defence and judge as and when necessary.

Because of the higher degree of legal representation in the High Court and because the prosecution in this case is carried out by the "senior men trained in law",

(interview with Judge Molai), the position is rather different. However, this does not suggest that the proceedings are always without flaws. For instance we noted that the judges also sometimes engage in activities that go beyond just refereeing the proceedings such as suggesting what alternative procedure the prosecution could follow, probing into issues of how the counsels handle the cases, assisting with the interpretation, cross-examining, reframing questions, raising objections and interjections and so on.

Beyond the above we have noted failure by legal practitioners to turn up for proceedings, medical practitioners failing to appear to give evidence, cases brought to court without sufficient evidence, failing to bring all important evidence to the attention of the court, inadequate provisions for legal aid, complications caused by the use of the English language which necessitates interpretation, insufficient numbers of legal practitioners, lack of sufficient established legal firms, concentration of legal practice in the Capital Town. All these make the application of the adversarial model less effective (easy). Contributing to what we have evidenced as unending requests for adjournments and postponements and extreme delays in the administration of justice. This confirms the observations by Von Benda-Beckmann (1985) about how what is considered to be "western" state law is also transformed, frozen, modernized, changed, or perverted

in the different contexts within which it is reproduced.

The thesis has portrayed some vital problems of effective administration of justice in a situation in which two or more different legal cultures coexist and interact in a progressive and inevitable change and adaptation (Holleman, 1979), Lesotho in this case being the case study. By focusing on what goes on at the practical level, I have sought to visualize a full picture of dispute settlement as composed of the official courts consisting of the received law courts and the customary courts, and the "unofficial" courts of the chiefs at the bottom, with the last two interacting in a highly complex process of progressive association and compromise. The overall conclusion that could be reached from the foregoing descriptions is that the adversarial model does not work in this case either, although in this context it is mainly for different kinds of reasons and principles - special class of influences (Woodman, 1985) - other than purely manipulative practices of those who operate the system as stressed in studies in the western world. On the whole what one finds in this case is a struggle to make the adversarial model work in an environment infested with different sorts of conditions and obstacles, many of which have to do with the model being implanted in a non-western setting, reflecting also upon indications by Woodman (1985) that norms cannot retain their original content as components of a different system, and one could add the

cultural expectations of the people involved. For the judicial system as a whole what has been produced is a hybrid system working partly on adversarial principles and partly along procedures of the "unofficial" courts which are more inquisitorial by outlook. This is an approximation of what Fitzpatrick (1983) has called the emergence of "combined law" resulting from the interaction of legal forms in plural legal systems or what Von Benda-Beckmann (1983) has sought to recapture with the words "compounding structuration" by which he referred to processes in which actors draw upon elements of different normative systems and combine them in compounded legal rationalization and justification schemes.

Through examination of what goes on at the practical level, this study highlights some of the shortcomings met in the application of the transplanted adversarial model, because in its ideology it tends to demarcate dispute settlement from the rest of social life of a great majority of Basotho people. What happens in the "unofficial" chiefs' courts and the customary courts, demonstrates the importance still attached to dispute processing mechanisms which emphasise on reconciliation, consensus, and are community-orientated. This is supported, as has been noted, by the multiplex relationships the people who live in the village context have with one another. But in addition, the study dismantles the notions which depict the judicial system as being dualistic, and as consisting only

of the customary courts and the received law courts, functioning parallel to each other. Such notions create artificial boundaries which, as demonstrated, can only not be found in practice, but also serve to obscure a true understanding of dispute processes now in existence.

APPENDIX A

FOOTNOTES

GENERAL INTRODUCTION

1. In the District of Teyateyaneng.
2. These would also be called "banna ba lekhotla" men of the court because of their participation in processes of dispute resolution, which was a complementary function to their administrative and other duties.
3. Signifying how some of the men of the Chief's Courts continue to be influential in the customary courts ("Treasury Courts").
4. Merry (1979) shows how threats to resort to courts may be used to effectuate a desired exit.
5. The man was actually a relative of the woman (neighbour) who was mentioned to have made the claims referred to at the beginning.
6. An indication of what kind of cases would be heard by the "unofficial" chiefs' courts, and those that would be referred to the customary courts. But could also signify an event whereby a criminal offence through the discretion of local police, was referred to a "Treasury Court" and not the Magistrates' Courts. The Local Court in Mapoteng is still popularly known as a "Treasury Court".
7. Shows the traditional aura that surrounds the

activities of customary courts, usually not present for the received law courts, except perhaps in *R. v Pitso Phakiso Makhoza and Others*, CRI/T/32/84 reported by M. Mamashela in CILSA Vol. XVIII, 1985, p.127.

8. Could be taken to signify the allegation of the Attorney General about the decisions of the official courts causing bitterness as indicated in Ch.4.
9. I believe this would be before the Roving Stock-theft Central Court, which has rightful powers to hear such matters, or its equivalent at the time. See Ch.4 for further explanations concerning this Central Court.
10. Principal Chief in the area.
11. Presume this would be a Central Court.
12. From Central Court cases proceed to the Judicial Commissioners' Court on appeal, which sits in District Headquarters in this case Teyateyaneng, and I presume this is what was happening.
13. Shows how some of the chiefs continued to act as president in the customary courts. Elaborated in Ch.3.
14. I believe the Magistrate had recused herself as demanded by new procedures.
15. Only the High Court has the jurisdiction to hear cases of ritual murder and treason as a matter of first instance. See explanation in Ch.5.
16. Provisions for legal representation are made only for proceedings in certain courts. In the Local Courts

"Treasury Courts" at that time legal practitioners could not appear hence why I could not see them in my village. Now they can appear in criminal cases only. See full descriptions in Ch.6.

17. As herdboys. Usually they would be involved in stock-theft cases, trespass by animals onto the fields, stealing mealies, and others.
18. Pertaining to the chiefs' courts ("unofficial" courts) Ch.3; customary courts, Local "Treasury" Courts, Central Courts (including the Roving Stock-theft Central Court), and the Court of the Judicial Commissioners, Ch.4; Magistrates' Courts and the High Court (received law courts), Ch.5; legal representation, Ch.6.
19. De Sousa Santos mentions that forms of legal pluralism are sometimes very clear in African countries. I return to this point again in Ch.1 under the literature review section.
20. Quoted in Galanter (1981). See also A. Griffiths (1987).
21. Particularly descriptions made in Ch.2 now constituting the "unofficial" Courts structure as labelled in this thesis.
22. Initiated the customary courts structure, Ch.4.
23. Part of the received law courts. There is also a Court of Appeal, see Ch.5.
24. That is, with the training of more nationals in the

received law.

25. A concept adopted from Abel (1979).
26. Which is a foreign language.
27. As stressed in studies that have focused on practices of similar courts in the west, refer to Ch.5.
28. See Appendix C.
29. Refer to the Methodology, Ch.1.

CHAPTER 1

1. See pp.48-54.
2. Refers mainly to Chapter 2, the History and Development of the Present Judicial System in Lesotho. But also, portions of other subsequent chapters make reference to the trend of changes brought by these enactments.
3. The works referred to here became particularly useful in working out the characteristic nature of dispute settlement in pre-colonial times, especially in view of the fact that not much has been written in this regard about Lesotho itself; the only renown work being that of Ashton (1952). These works become vital in making the descriptions contained mainly in Chapter 3, entitled, The "Unofficial" Courts : The Indigenous Framework for Dispute Settlement among Basotho.
4. The literature reviewed under this section became most

pertinent in Chapter 5, The Official Courts II : The Received Law Courts, which form the more accusatorial level in the overall judicial system of Lesotho. However, as discussed in the chapter the employment of these works in the context of the courts in Lesotho should be approached with outmost caution. For a complete argument on this see Ch.5.

5. Equivalent of "formal justice" (Perelman, 1945) meaning the application of the same norms to all members as described in Kamenka and Tay (1979), pp.23-24. See also Passmore (1979) pp.33-5 in Kamenka and Tay Supra. Also Rawls (1971), Tonnies (1936).
6. Principles of social justice as formulated by various theories such as Marx are undoubtedly principles of distributive justice. They concern distribution of goods in society. For a more elaborate discussion of this type of justice refer, e.g. to Lang pp.116-148 in Kamenka and Tay Supra; Rawls (1971); and Tonnies (1936).
7. With the limitations of the length set for this thesis, it has not been possible to deal with this subject in any extensive manner, but it remains an area of research for the future as part of the attempt to understand how the official courts, in particular, operate.
8. Further explanation is made about observations in the "unofficial" courts on pp. 37-41.

9. Main reasons why the disguised entrance alternative as being suggested here was avoided are explained further below. It is not simply a speculative statement of what could have happened, but it also involves ethical standards of social research.
10. Concept adopted from Goodwin-Jones (1984).
11. During the proceedings of CO/4/MCM/MM3/16.3.87 when the magistrate raised a question about my note-taking, it was the public prosecutor who came to my rescue. The Magistrate had, by mistake, not been informed about my research, since when I started to attend the proceedings of the Magistrate Courts in Maseru, she had been away on leave. An explanation having been made she permitted my exercise to continue.
13. It was also for purposes of assessing whether the observed behaviour recurred in proceedings of various matters brought to court, e.g. whether in civil or criminal proceedings, in different courts, when handled by different court personnel, etc.
14. Appendix G contains interview schedules which were prepared as a guideline for questions which were to be put to various categories of informants as envisaged during the preparatory stages.
15. See list of key informants, Appendix F.
16. Provision is made under the Children's Protection Act No. 6 of 1980.
17. Many of the respondents made their descriptions in

Sesotho, and these have had to be translated into the English language without losing the context and sense of the viewpoints as expressed during the interviews.

CHAPTER 2

1. Elaborated versions of the history of the Basotho can be found in the works of Palmer and Poulter (1972); Ashton (1952); Burman (1976); Duncan (1960), etc.
2. Referred to in this thesis as the Official Courts, consisting of the customary courts and the received law courts.
3. Now largely constituted by the "unofficial" chiefs' courts in the conception used in this work.
4. See mainly Ch.3 for a detailed description of the continuing existence of these courts. Noted also in the works of Palmer and Poulter (1972); Hamnett (1970).
5. Refer to Appendix J for a list of official documents making provisions referred to here.
6. The actual statement of Moshoeshoe is quoted on p.79.
7. See, for example, the words of Queen Regent Mantsebo Seeiso (1951) cautioning the Resident Commissioner that the colonial government should not take upon itself, powers not included in the covenant of the alliance and protection between Moshoeshoe and Queen Victoria. See also the response of the Resident

Commissioner Forsyth Thompson in Machobane (1985), p.5.

8. Interview with George Bereng, 3.4.1987.
9. Rolland's Memorandum, dated 30 March 1968 BR Vol. VI Part I (1871-72), p.126.
10. Ibid. p.129. See also Burman (1985).
11. See generally Burman (1985); Machobane (1985, 1986); Palmer and Poulter (1972); for an elaborated version of the feuds involving Moshoeshoe's sons, issues on Moshoeshoe's succession.
12. Interview with Bereng, 3.4.1987.
13. It was viewed as contrary to the arrangement which Moshoeshoe had proposed in seeking British protection.
14. This was expressed clearly in the interviews with Damane 13.2.1987 and Bereng 28.4.1987 (continuation).
15. Interview held on 3.4.1987.
16. Interview held on 13.2.1987.
17. See in particular Burman (1985), p.31.
18. This could be interpreted as well fitting within the context of the idea that Lesotho would finally be incorporated into South Africa.
19. Proclamation No. 44 of 1 July 1877.
20. Burman (1985) p.34, argues that at a stroke of a pen, customary law was changed from being the normal law of the country to being a concession made to the Basotho, since it was stated that in cases involving Natives (Basotho) could by discretion (may) be dealt

with according to Native law.

21. Proclamation No. 44 of 1 July 1877, Sec.24.
22. In the interview held with Maope on 16.2.1987, he does, however, accept the continuing existence of the "unofficial" chiefs' courts. Not only that, he expressly indicated their usefulness in the administration of law and justice, as shall be noted in Ch.3.
23. See Burman (1985), for example.
24. Viewed by Poulter (1972) as having sparked off the War of Guns.
25. For details of the Award see Burman (1985), p.39.
26. Refers to a public assembly. See also Palmer and Poulter (1972) pp.32-34.
27. Berea, now known as T.Y. (Teyateyaneng). See quotation from Bereng, last sentence below.
28. See particularly pp.84-86.
29. Sec. 4, Proclamation 2B, 1884.
30. This parallelism is later on contended, that in reality even the customary courts and the received law courts cannot be claimed to be operating parallel to each other, that the former are actually subordinate to the latter. See in particular Ch.4.
31. This was before the Basutoland National Council, which had by now been set up.
32. Not all these can be described in full in this work, but see the following explanation.

33. Cape Parliamentary Papers, 1876.
34. Sir Alan Pim's Report on the Financial and Economic Position of Basutoland, 1935.
35. In his work Machobane (1985) argues that this whole situation was prompted by the question of the unclear constitutional position of Lesotho under the colonial rule, see in particular pp.2-6. Hobson (1938) also noted Britain's laissez-faire attitude in Basutoland pp.245-246.
36. In the customary courts, reference is often made to the Laws of Lerotholi. In CO/4/JCCQ/JCS/3.6.87 during the debate concerning the allocation of the piece of land in question, the counsel for the appellant made reference to the Laws of Lerotholi. In CO/18/JCCQ/JCS/8.6.87, reference was made to the same Laws by the appellant. These proceedings involved some cattle which had been confiscated. Judge Molai in an interview emphasised the importance of the Laws of Lerotholi in the customary courts.
37. For a fuller description see Poulter (1972).
38. Work parties.
39. This was confirmed in the interviews with Damane 13.2.1987; and Bereng 28.4.1987 (continuation).
40. See in particular pp.117-119.
41. Quoted from the Autobiography of Jingoos compiled by Perry and Perry (1975).
42. This view, however, does not contradict the former,

since Pim reported on the factors which ensued within the relations between the colonial administration and the indigenous government and the contradictions that resulted from the attitude of the former which he described as "protection without control". Also see the following paragraph.

43. Which can be viewed as connected to the increase in the numbers of chiefs as a result of the system of "placing" described on pp.117-119.
44. A comprehensive discussion of the 1938 reforms is found in Hailey (1953), *Native Administration in British African Territories*, Part V, pp.70-111.
45. See in addition Ashton (1952) and Palmer and Poulter (1972).
46. Continuation of interview with Bereng on 28.4.1987.
47. One of the popular sayings among Basotho, denoting that while chieftainship is hereditary, its stronghold rests on the people's popular approval.
48. Bereng, interview held on 28.4.1987 (continuation).
49. Bereng, as above.
50. Bereng, as above.

CHAPTER 3

1. Only used in this context to depict that these are not officially and in legal terms accepted as institutions possessing judicial powers. But practice as against

theory shows that they operate just as the official courts do in the settlement of dispute.

2. Report of Commission on Laws and Customs of Basotho (1873) under chairmanship of Charles D Griffith as recommended under the head "Courts of Law".
3. It was mentioned in the methodological chapter (Ch.1) that permission to carry out observations in the "unofficial" courts was not obtained hence that was supplemented through obtaining detailed descriptions about the nature of proceedings in these courts as given by some of the chiefs.
4. Maope in an interview held on 16.2.1987, mentioned in particular the continuing use of "family councils" in such matters as marriage breakdown.
5. Used mainly to substitute information that could have been obtained through the observations. See note 3, above.
6. Hamnett (1975) points out that when the population of Lesotho was estimated at 800,000, the number of gazetted chiefs alone was rather over 1,100, thus the number of courts would be the same. These were on the onset recognised in terms of Proclamation No.61 of 1938, and were also issued warrants to exercise judicial powers under Proclamation No. 62 of 1938.
7. From observations CO/MSLC/2/23.4.87, Ch.4, p.286, p.287, p.288.
8. The "unofficial" chiefs' courts sit daily, and

whenever there are disputes to be resolved these are dealt with, otherwise other business of the day such as "administrative" matters would be proceeded with.

9. See footnote 6 above.
10. See quotation from the interview with the Chief Magistrate Matete on p.161.
11. Director of Public Prosecutions, Peete, was interviewed on 30.1.1987.
12. Refers mainly to "fights" or acts of violence among children, women, herdboys, which seldom get reported to the police, except where serious injuries are caused.
13. Especially the Magistrates courts.
14. Interview held with the Acting Chief Justice on 16.2.1987.
15. That is if the Chief fails to resolve the matter himself.
16. Reaffirms the point made by Resident Magistrate Mohale as referred to on p.157.
17. Judge Molai, interviewed on 6.3.1987 (continued).
18. Understood in this sense to mean initiating court proceedings.
19. Also mentioned by Damane, interviewed on 13.2.1987.
20. Except in matters of extreme seriousness.
21. Quoted from an interview with the Chief Magistrate, Matete, held on 8.5.1987.
22. From an interview with Damane, 13.2.1987.

23. That is, the Official Courts.
24. Read (1966) p.51, explains that the absence of the distinction between civil and criminal cases in traditional African law is linked to the importance granted the reconciliation of the offender to the community and to the emphasis placed on "restoring the equilibrium" between the parties.
25. Used in this sense as a form of restitution to the injured parties.
26. See above. Known as Sesotho as "ho rothetsa legeba".
27. This is addressed fully in the next chapter, but this would be in cases first heard as criminal matters before the official received law courts, following which civil proceedings before customary courts can be instituted to claim compensation.
28. For example, Acting Chief Justice, Kheola, 16.2.1987, Judicial Commissioners, Sennane and Loko, 7.5.1987; Maope, Attorney General, 16.2.1987. However, conflicting opinions were offered in respect of such offences as "assault", see pp.170-171 for explanation.

The word "normally" does indicate that in certain instances and for particular cases, the "unofficial" courts are still consulted.
29. Quotation from an interview with Peete, Director of Public Prosecutions, 30.1.1987.
30. The situation, as shall be indicated in the next chapter, is still largely the same.

31. From an interview with Damane 13.2.1987.
32. Could be translated to mean "he who stumbles in court cannot be prosecuted for it".
33. Closest translation could be "In court men do not skim facts", meant to indicate that all participants can add whatever evidence or put whatever questions that could assist the court to reach a just and satisfactory solution.
34. The book contains two stories involving dispute settlement. Here reference is mainly made to the first in which the smallest birds lodge complaints against the bigger ones, expressing their grievances openly in court without fear of further attack and persecution.
35. While this may be a procedure in more industrialised societies, the similarity here is made in terms of the role played by the court in investigating the matter before it.
36. Implicitly stated in an interview with Crown Counsel Ntsonyana, 18.3.1987. But see statement of Resident Magistrate, Mohale, below.
37. Confirmed by Damane, interviewed on 13.2.1987.
38. Refers to newly qualified legal practitioners. The Chief Magistrate's observations arise from the proceedings before the Magistrates' Courts, but are used here to reinforce the point made by Resident Magistrate, Mohale and Crown Counsel Ntsonyana.

39. See generally Gluckman (1969) on procedures and evidence in African customary law and criticisms levelled against them.
40. This means that "no one speaks for another when he is there to speak for himself".
41. Refers to both the Native Administration Proclamation No.61 of 1938 and the Native Courts Proclamation No.62 of 1938.
42. Specifically mentioned in the interviews with Peete, Maope, Mohale and Kheola (see Appendix F).
43. See e.g. p.155, p.157 and also pp.172-179 for cases outside the jurisdiction of the "unofficial" courts.
44. See quotation on p.148.
45. Full statement appears on p.158.
46. Used in this context to denote the whole official court structure.
47. See full quotation on p.205.
48. Maope's statement about "bitterness" comes relevant here, see p.169.

CHAPTER 4

1. Refer to Diagram 1, p.15 for the hierarchy of these courts. Also see Appendix B for the schedule of Central and Local Courts at present.
2. Established in terms of the Native Courts Proclamation No.62 of 1938.

3. Referred to, in this thesis, as the "unofficial" chiefs' courts, Ch.3.
4. Refers mainly to such aspects as payment of fees, personnel, fixed hours of work, accusatorial principles.
5. It is generally held that the indigenous system is more inquisitorial in approach, while the received law system is accusatorial. See Maope (1985), Palmer and Poulter (1972).
6. Expressed and admitted by informants such as the Acting Chief Justice, Kheola; Attorney General, Maope; Judge Molai; Director of Public Prosecutions, Peete.
7. For elaborated descriptions of criticisms against the indigenous system see especially pp.218-223. Reference must also be made to Chs. 2 and 3.
8. Not Native Courts as at the beginning, but now called Local and Central Courts, and also not the Paramount Chief's Appeal Court but the Judicial Commissioners' Court. The Native Courts came to be called Basuto Courts in 1958, and the Paramount Chief's Court was at one time (1944) replaced by the District Commissioners' Courts.
9. i.e. The Native Courts Proclamation No.62 of 1938, and the High Commissioner's Notice No.32 of 1946 respectively.
10. See Ch.2.

11. The Native Courts Proclamation No. 62 of 1938.
12. Maintained in a subsequent law - Proclamation No. 23 of 1958, Sec.3, which divided these courts into First Grade: The Basuto Central Courts (with a headquarters at Matsieng, and regional divisions), and Second Grade: Basuto Local Courts.
13. Interview with Bereng, 28.4.1987.
14. Royal village.
15. Also see Ch.2.
16. See also Palmer and Poulter (1972) below.
17. Set in accordance with Proclamation No.11 of 1946.
18. Appointed by the Resident Commissioner in Concurrence with the High Commissioner. See explanation on pp.218-219.
19. See Pim Report of 1935.
20. Pursuant to the idea to separate the "judicial" from the "administrative" powers of chiefs.
21. The number of Court clerks varied from one to four, and of messengers from one to three.
22. Refers to the men of the Court. But see again Ashton (1952) as referred to on the next page.
23. i.e. in the Local and Central Courts.
24. Should be read along with the view of Ashton (1952) appearing on p.222.
25. Similar additions have been made to the jurisdiction of the customary courts in recent years as noted on p.246.

26. For more elaborate discussions of this clause, see Poulter (1972).
27. Central and Local Courts Proclamation No.62 of 1938, Sec.9(a).
28. This view is contained in the existing literature, for instance, Palmer and Poulter (1972) as quoted on the next page.
29. Refers to Proclamation 2B of 1884.
30. Sec. 26, Central and Local Courts Proclamation No.62 of 1938.
31. Fines and imprisonment for a period not exceeding 12 months.
32. See p.218 for a detailed description of the various ranks into which the Native Courts were classified.
33. Proclamation No. 23 of 1958.
34. See pp.232-234.
35. Refers to 3 classes (ranks) into which these courts are categorised, now consisting of Local Courts, Central Courts, and the Judicial Commissioners' Court.
36. Native Courts Proclamation No. 62 of 1938 to Basuto Courts Proclamation No.23 of 1958.
37. Also true in the sense that this system has its foundations in the rules of the English and Roman-Dutch laws as dictated mainly by Proclamation 2B of 1884.
38. Throughout most of this period Chieftainess Regent Mantsebo reigned.

39. The Paramount Chief's Appeal Courts, later District Commissioners' Courts; and the Native Courts, later Basuto Courts.
40. From interview with the Acting Chief Justice Kheola held on 16.2.1987.
41. The case is discussed on p.277.
42. See p.281.
43. In accordance with Proclamation No.25 of 1950.
44. Provided for in terms of the Judicial Commissioners' (Amendment) Act No. 9 of 1976.
45. See further details in Ch.6.
46. These statistics were obtained by going through the fieldwork diary, and counting the cases observed when this court was on circuit in Quthing.
47. Refer to the above statistics.
48. These are the courts which in 1938 came to be entitled the Native Courts in terms of Proclamation 62 of that year, and later came to be known as Basuto Courts under Proclamation 23 of 1958.
49. See explanation on pp.220-221 and pp.222-223.
50. In association with the Basuto Courts Proclamation No.23 of 1958.
51. See explanation on p.236.
52. See example in the next paragraph.
53. See explanation p.245.
54. Reprinted as amended in Volume X of the Laws of Basotoland, 1965.

55. Sec.9 Central and Local Courts Proclamation No.62 of 1938.
56. In terms of Sec.26 of Proclamation No.62, of 1938.
57. See example of pp.295-296.
58. Refers mainly to those dealt with by Local Courts when they fall out of their jurisdiction.
59. Refer to arguments in Ch.6.
60. Regulation 10 of 1965 as amended.
61. Refers to the Central and Local Court Rules as stated above.
62. See Ch.6 since they are common in cases where legal practitioners appear.
63. See Perry (1977) referred to on p.260.
64. Quoted from interview with Chief Magistrate Matete. The fact that the assessor in CO/6/JCCQ/JCS/3.6.87 discussed on p.267 was previously a president of a Central Court, confirms the point about the system producing its own personnel.
65. Refers to the received law courts, to which the Acting Chief Justice was addressing himself at this juncture.
66. Refer to p.266 for descriptions of observation in this case. Also discussed on p.283.
67. Should be read together with the point raised by the Chief Magistrate, the Acting Chief Justice and the Attorney General on pp.263-265.
68. Speaking of traditional customary procedures in Africa generally.

69. See quotation on p.282.
70. Refer to Ch.6.
71. Respondent had been in court earlier, but had disappeared shortly before his case was called.
72. The reforms described in Ch.7 pp.457-461 were made in the light of this observation.

CHAPTER 5

1. By the completion of the fieldwork, two more expatriate judges had been appointed, one who whom became the Chief Justice.
2. The districts were established in terms of Proclamation No.74 of 1871.
3. See complete account of this point in Ch.2.
4. For the classification of the Magistrates Courts during this period see p.307.
5. In 1967, as reported by Palmer and Poulter (1972), there were no Magistrates Courts of the Third and Special Classes in operation.
6. Now there is a Chief Magistrate and provision has also been made for Senior Resident Magistrates' posts, in accordance with qualifications held by the newly emerging cadre of Magistrates and the prospects that more will attain professional degrees.
7. Diploma in Law Course was referred to on p.307. The Diploma in Law graduates are now taken at Third Class

level when they come into service. With the consideration that all Magistrates should hold minimum B.A. Law qualifications, the intention is that they will enter service at the Second Class rank, meaning the Special Class and Third Class ranks will be scrapped.

8. Decisions of the Third Class Magistrates are reviewed by those of the First Class and not the High Court. See Sec.4 of Proclamation No.58 of 1938 as amended.
9. e.g. Refer to PART I(4) of the Criminal Procedure and Evidence Act of 1981, the Subordinate Courts Proclamation No.58 of 1938 as amended, Secs. 60, 61, 62 and other relevant sections.
10. PART VII of the Criminal Procedure and Evidence Act of 1981.
11. e.g. Attorney General, Maope; Crown Counsel Ntsonyana; Chief Magistrate, Matete.
12. Refer to PART II of the Subordinate Courts Proclamation No.58 of 1938, as amended.
13. The relevant Section in the Subordinate Courts Proclamation No.58 of 1938 refers to matters beyond the jurisdiction of the Magistrates' Courts.
14. The point about legal practitioners is followed up in Ch.6.
15. Including e.g. the High Court Act No.4 of 1967, the High Court Order No. 17 of 1970 introduced following suspension of the 1966 Constitution; the High Court

Act No. 5 of 1977; superceded later by the High Court Act No.5 of 1978 in almost identical form.

16. e.g. The right to life, freedom of movement and residence, freedom from inhuman treatment, the right to respect for private and family life, the right to a fair trial, the right to equality before the law, and equal protection of the law.
17. Customary marriage being the duty of Customary Courts, Ch.4.
18. An example would be an instruction that a different Magistrate should preside over the proceedings.
19. Refers to instances where Judicial Commissioners decline to grant permission for appeal to the High Court, in which event application could be submitted to the latter.
20. See statement of the Acting Chief Justice about "Circuit" courts on p.325.
21. Understood in this sense to refer mainly to the Magistrates Courts.
22. Report read at the opening of the first session of the High Court in February 1987.
23. At the time of the field research only 3 judges were in office. But see Footnote 1 above.
24. One of the 3 judges in post as mentioned above.
25. Refer to Appendix H.
26. For complete descriptions of the Privy Council see Palmer and Poulter (1972).

27. Reference was being made to the High Court.
28. Refers mainly to High Court Rules of 1980 and Subordinate Courts Rules of 1938.
29. Court of Appeal Rules of 1980.
30. Sec.21 of High Court Rules of 1980.
31. Further descriptions on legal representation appear in Ch.6.
32. Similar point to that made in the works of Carlen (1976), Ericson and Baranek (1982), Friedland (1975) etc.
33. Descriptions in Ch.6 actually demonstrate that in the customary courts, except perhaps in the Roving Stock-theft Central Court, prosecutors do not appear nor is legal representation a common phenomenon.
34. Disclosure of this Magistrate's name is withheld for confidentiality.
35. Some of these people were mentioned to have been in custodial remand for periods of close to a year, yet police investigations were not near completion.
36. Packer (1968 : 225).
37. See p.300 for the other studies referred to here.
38. Used in this context to denote both the "unofficial" Chiefs' Courts and the customary courts processes based more on Sesotho custom.
39. By this the Acting Chief Justice was referring to the received law courts, as he explained in a further statement.

40. In the customary courts people are simply warned to speak the truth.
41. Accepted as Exhibit A.
42. See other examples of similar inadequacies further below.
43. e.g. in CO/3/TC/MM2/14.5.87, Ch.6. p.435, where the Crown Counsel mentioned, having "heard" that the accused had been to South Africa.
44. Asked in Sesotho the question was asked "Ha mang ha Tsosane moo?"
45. Accused No.10.
46. See p.358.
47. See Subordinate Courts (Amendment) Order No.3 of 1973.
48. i.e. Chief Justice Mapetla.
49. See CO/4/MCM/MM3/16.3.87 on p.358.
50. Interview with the Chief Magistrate, Matete dated 8.5.1987.
51. Discussed further in Chapter 6.
52. See footnote above.
53. Refer to descriptions in Chapter 6.

CHAPTER 6

1. See the works of Tomasic and Feeley (1982), Danzig and Lowy (1975), Garofalo and Connelly (1980), Merry (1978), Sander (1976), Nader (1969), Nader and Singer (1976), Bell (1978), etc.

2. Weaknesses of adjudication and the adversary system are contained in works of Paterson and Bates (1983); Galanter (1976); White (1975); noting the inequality in representation, Bottoms and McClean (1976); McConville and Baldwin (1977); McBarnet (1981); Carlen (1976); noting delays in court processes and its causes, Greer (1971); Frank (1949) noting weaknesses of evidence. Also see Bankowski and Mungham (1976); Friedland (1975); Freeman (1981), Twining (1984).
3. Refer to interviews with Maope, Matete, and Kheola for confirmation of this statement (see Appendix F).
4. Such as financial reasons, absence of lawyers in the districts, etc.
5. Refers to the Native Courts Proclamation No.62 of 1938.
6. Regulation 10 of 1964, Section 14 and also see Section 20 of the Central and Local Courts Proclamation No.62 of 1938 as quoted below.
7. Section 20 of the Central and Local Courts Proclamation, see Footnote 6.
8. See Chapters 3 and 4.
9. From interviews with matete and Molai (refer to Appendix F).
10. Interview with Judge Molai, in particular.
11. Interviews with Molai, Matete and Maope (see Appendix F).

12. That is continuity between the "unofficial" chiefs' courts and the customary courts.
13. Refer to Matete's statement quoted further down.
14. See particularly descriptions on pp.400-404.
15. The fact is that the counsels had been there in the morning but decided to disappear for whatever reason.
16. For classification of the legal profession, see Palmer and Poulter (1972).
17. Stated by the Chief Legal Aid Counsel in an interview with him. He was making indications that the same applies to lawyers taken in legal aid cases.
18. Report of Proceedings of a Seminar on Legal Services in Rural Africa, Limuru (Kenya) 1-4 October 1984.
19. Legal Aid Act No.19 1978, Section 4.
20. Section 5 of the above Act.
21. Section 6 of above.
22. Section 7(1) of above.
23. Section 7(4) of above.
24. Section 13 of above.
25. Appendix I
26. Refer to the works of Paterson and Nelken (1984), Paterson and Bates (1983), Bankowski and Mungham (1976), Zander (1969), White (1974), Paterson (1979), etc.
27. In criminal cases it would be against the state prosecutors or crown counsels.
28. Refer to an instance in CO/6/HC/JK/9.3.87 discussed

later on pp.431-432.

29. See explanation of Street Law Project in Ch.1, pp.67-68.
30. Discussion of this case is continued on p.432.
31. Chapter 5, pp.367-368.
32. For complete descriptions on this case refer to Ch.4. pp.282-283.
33. Following several attempts to make the counsel state question correctly.
34. The ones who had already adduced evidence before the court.
35. See descriptions from Judge Molai and the Chief Magistrate on pp.394-395.
36. Refer to Chapter 5, pp.370-374.
37. e.g. CO/104/HC/JK/17.3.87, p.435.

APPENDIX B

SCHEDULE OF CENTRAL AND LOCAL COURTS AT PRESENTMASERU

Matsieng Central Court

1. Maseru Local Court*
2. Matala Local Court
3. Maja Local Court
4. Ralejoe Local Court
5. Likalaneng Local Court
6. Marakabei Local Court
7. Setleketseng Local Court
8. Semione Local Court
9. Ramabanta Local Court
10. Semonkong Local Court
11. Rothe Local Court
12. Matsieng Local Court

MAFETENG

Ramokoatsi Central Court

1. Mafeteng Local Court
2. Van Rooyen's Local Court
3. Mphobe Local Court
4. Mapotu Local Court
5. Kolo Local Court
6. Thabaneng Local Court

7. Ribaneng Local Court
8. 'Mamaebana Local Court
9. Ramokoatsi Local Court
10. Thabana Morena Local Court

MOHALE'S HOEK

Likueneng Central Court

1. Tsoloane Local Court
2. Maqoala Local Court
3. Likueneng Local Court
4. Khuiting Local Court
5. Ketane Local Court
6. Phamong Local Court

QUTHING

Quthing Central Court

1. Mokanametsong Local Court
2. Dilli-Dilli Local Court
3. Sebapala Local Court
4. Mt. Moorosi Local Court
5. Uphaki Local Court

QACHA'S NEK

Makhaola Central Court

1. Seforong Local Court
2. Sekake Local Court
3. Mokopung Local Court

4. Qabane Local Court
5. Ratsoleli Local Court
6. Sehlabathebe Local Court

THABA-TSEKA

Thaba-Tseka Central Court

1. Mantsonyane Local Court
2. Lesobeng Local Court
3. Matsaile Local Court
4. Sehong-Hong Local Court
5. Semenanyane Local Court
6. Thaba-Tseka Local Court

MOKHOTLONG

Salang Central Court

1. Mapholaneng Local Court
2. Thabang Local Court
3. Thaba-Ntso Local Court
4. Phahameng Local Court

BUTHA-BUTHE

Hololo Central Court

1. Manamela Local Court
2. Makhunoane Local Court
3. Khukhune Local Court
4. Motete Local Court

LERIBE

Tsifalimali Central Court

1. Peka Local Court
2. Maputsoe Local Court
3. Tsikoane Local Court
4. Pitseng Local Court
5. Tsifalimali Local Court
6. Tale Local Court
7. Lejone Local Court

BEREA

Motjoka Central Court

1. Majara Local Court
2. Sefikeng Local Court
3. Mamathe Local Court
4. Mapoteng Local Court
5. Bela-Bela Local Court
6. Motjoka Local Court

- * Maseru Special Local Court (Ch.4, see also Appendix D).

APPENDIX C

WORK PLAN OF FIELDWORK ACTIVITIES

October, 1986 - August, 1987 = 11 Months

a) Phase 1

October, 1986 - January, 1987 : Setting up the fieldwork.

- i) Gaining access to the courts, writing out letters of request for permission to conduct the study to the Ministries of Justice and Ministry of Interior.
- ii) Research in the National Archives of Lesotho.
- iii) Collection of other documents relating to the Courts - Proclamations, Acts, Orders, Regulations, etc.
- iv) Drawing up a list of important and relevant institutional sources of information e.g. Law Society, Directory or list of legal practitioners.
- v) Translation of interview schedules into Sesotho.
- vi) Selection of Courts' sample for observation and choosing geographical areas of study i.e. Districts and villages, the latter for the Chiefly Courts in particular.
- vii) Consultations with resource persons e.g.

lawyers at the University of Lesotho; Court Clerks (Registrars for the High Court); Courts' Organiser (Ministry of Justice).

viii) Making appointments with key informants.

b) Phase 2

February, 1987 - June, 1987 : Setting up the fieldwork.

Courtroom Observations

OFFICIAL COURTS

UNOFFICIAL COURTS

c) Phase 3

Interviews:

OFFICIAL COURTS

UNOFFICIAL COURTS

i) Court Personnel:

Court Presidents,
judicial commissioners,
judges, magistrates.

Chiefs and their
panels of assistants.

ii) Category two:

Court clerks,
prosecutors, defence
counsels, assessors,
interpreters.

Other active
participants, e.g.
relatives.

iii) Category three:

Parties and witnesses.

Parties and witnesses.

APPENDIX D

GUIDE TO CODES FOR COURTROOM OBSERVATIONS

CO	Courtroom Observation (followed by a number of the case observed)
HC	High Court
JCC	Judicial Commissioners' Court
MCM	Magistrates Court, Maseru
MCQ	Magistrates Court, Quthing
TC	Traffic Court
RSTCC	Roving Stock-theft Central Court
MSLC	Maseru Special Local Court
M	Maseru
JK	Judge Kheola
JM	Judge Molai
JL	Judge Lehohla
JCS	Judicial Commissioner Sennane
MH	Magistrate Hlajoane
MM	Magistrate Mohale
MM1	Magistrate Mapetla
MM2	Magistrate 'Matli
MM3	Magistrate Mokoena
MM4	Magistrate Matete

MM5	Magistrate Moeletsi
MN	Magistrate Nkhereanye
MN1	Magistrate Ntsonyane

NOTE

Last digits in each of the codes as they appear in the thesis signify the date when the observation was conducted.

APPENDIX E

POSITION OF MAGISTRATES IN OFFICE

<u>DISTRICT</u>	<u>NUMBER OF MAGISTRATES</u>
BUTHA-BUTHE	: 1 Resident Magistrate 1 First Class Magistrate
LERIBE	: 1 Resident Magistrate 1 Second Class Magistrate
TEYATEYANENG	: 1 Resident Magistrate 2 First Class Magistrates
MASERU	: 1 Chief Magistrate 1 Senior Resident Magistrate 3 First Class Magistrates 4 Second Class Magistrates
MAFETENG	: 1 Resident Magistrate 1 Second Class Magistrate
MOHALE'S HOEK	: 1 Resident Magistrate 1 First Class Magistrate
QUTHING	: 1 Resident Magistrate 1 First Class Magistrate
QACHA'S NEK	: 1 First Class Magistrate
MOKHOTLONG	: 1 First Class Magistrate
THABA TSEKA	: 1 First Class Magistrate 1 Third Class Magistrate

APPENDIX F

LIST OF KEY INFORMANTS

<u>NAME AND TITLE</u>		<u>DATE OF INTERVIEW</u>
1. Kheola,	Acting Chief Justice	16.2.1987
2. Molai J.,	Judge of the High Court	3.3.1987; 6.3.1987
3. Loko,	Judicial Commissioner	7.5.1987
4. Sennane,	Judicial Commissioner	7.5.1987
5. Maope K.A.,	Attorney General	16.2.1987
6. Peete, S.,	Director of Public Prosecutions	30.1.1987
7. Matete,	Chief Magistrate	8.5.1987
8. Mohale N.,	Resident Magistrate	30.7.1987
9. Nkhereanye N.,	Magistrate	
10. Ntsonyana M.,	Crown Counsel	17.3.1987
11. Moeletsi M.,	Magistrate	
12. Damane M.,	Historian, former Lecturer, University of Lesotho	13.2.1987
13. Bereng G.,	Retired Civil Servant, participated in reforms the constitution in preparation for Independence.	3.4.1987; 28.4.1987
14.*Lehloenya P.,	Chief of Mahloenyeng	25.2.1988
*Thabo Lebloenya,	Chief of Lesobeng (Takalatsa)	25.2.1988
15.*Kopano Selema,	Chief of Linokong Haselema (under Kuini Mopeli)	18.4.1988
16. Ramolefe, A.M.R.	Training Officer, Ministry of Justice	11.6.1987
17. Moorosi,	Chief Legal Aid Counsel	18.2.1987

NOTES

1. In addition 10 female inmates were interviewed at the Maseru Female Prison (14.5.1987) and 10 male inmates from the Central Prison in Maseru (20.5.1987). For confidentiality their names cannot be revealed.
2. * Indicates the chiefs who provided descriptions of how the "unofficial" chiefs' courts operate in the present day.

APPENDIX G

INTERVIEW SCHEDULE FOR MAGISTRATES, JUDICIAL COMMISSIONER,
COURT PRESIDENTS, COURT CLERKS, ASSESSORS AND CHIEFS.

CONFIDENTIAL:

CATEGORY OR RESPONDENT:

COURT :

AREA :

OPENING QUESTIONS.

1. How long have you been in this job?
Have you previous experience in court work?
If so, please state place and position.
2. What made you decide to choose this job?
What is it about it that attracts you?

ROLE AND PURPOSE OF COURT PROCEEDINGS.

3. How do you view your role as Magistrate/Judicial Commissioner/Court President/Court Clerk/Assessor/Chief in the administration of justice?
Do you think your purpose is achieved?
4. Do people want their cases heard in court?
If yes why?
Do you feel parties in dispute achieve what they are looking for?
If not, why is that?

COURT PROCEDURES, RULES OF EVIDENCE, ORGANISATION AND
STRUCTURE OF COURTS.

5. What do you think of the way the courts are organised?
6. Do you feel everyone understands the court procedures?
Do these procedures present any problems for either
the accused or the prosecution during the proceedings?
Do they present problems for you?
7. What do you think of the manner evidence is presented
in court?

Is there any difference between what you think is
relevant and important information and the evidence
brought up in court?

Why do you think this occurs?
8. Do you think the language used in courts is too far
removed from the parties ordinary, every day language?
How do you feel about English being used as a medium
of communication in some of the courts?

When you see the accused standing in the dock what
impression do you get of whether or not they can
follow what is being said?

UNDERSTANDING AND PARTICIPATION OF PARTIES IN PROCEEDINGS.

9. When you see the parties in court do you get the
feeling that they do/do not understand what is going
on?

If yes, can you give examples?

If no, why is that do you think?

10. Do you feel they should understand?

How about their participation in the proceedings,
should they participate?

PERSONNEL AND TRAINING.

11. Should magistrates and court presidents be legally
trained?

How much of legal knowledge do they need? Please
indicate

A lot

A fair amount

Not very much/none at all

Why do you say that?

12. How important is the role of assessors, chiefs and
interpreters in court?

13. What do you think are the most important qualities in
a good magistrate, court president, judicial
commissioner?

GENERAL IMPRESSION ABOUT COURTS.

14. Do you think the courts are the best way of dealing
with the sort of disputes normally brought before you?
Would you like to see some matters or cases removed
from the courts and dealt with elsewhere?

If yes, please explain.

15. It has been argued (e.g. by some academics) that
defendants in criminal cases face difficulties in

obtaining legal help.

Would you agree or disagree with this statement?

What sort of difficulties do you think they experience?

If so, how do you think such problems can be solved?

QUESTIONS FOR CHANGE.

16. Have you suggestions for change in the courts, any improvements you would like to see made in the nature of the proceedings (e.g. structure and organisation, personnel, training, legal formality, evidence and procedure?)

Why is that?

INTERVIEW SCHEDULE FOR PROSECUTORS AND DEFENCE COUNSELS.

CONFIDENTIAL.

CATEGORY OF RESPONDENT:

COURT :

AREA :

OPENING QUESTIONS: EXPERIENCE AND SOCIALIZATION.

1. What made you become a court lawyer?

What is it about court work that attracts you?

What other kinds of work do you deal with?

(chamber work, civil or criminal)

In which courts have you appeared on behalf of someone?

Have you not appeared in other courts?

If not, why is that?

ROLE, NEED AND PURPOSE OF COURT PROCEEDINGS.

2. What does your role as a representative of someone in court consist of?

Is that role fulfilled?

If no, why not?

3. Do people want their cases heard in court?

If yes, why?

Do you feel parties in dispute achieve what they are looking for?

If not, why is that?

UNDERSTANDING THE PROCEEDINGS BY LITIGANTS.

4. When you see your clients before court do you tell them what to expect in court?

Please explain the sort of things you bring to their attention, are there any routine points you discuss e.g. pleas, presentation of evidence, etc?

Do you have time to explain what to expect?

What sort of things get into your way in explaining proceedings to the clients, if any?

5. Do you feel they participate in the proceedings?

Do you feel parties do understand the proceedings and the procedure?

If yes, can you give examples, if not, why is that do you think?

COURT STRUCTURE AND ORGANISATION, PROCEDURES AND RULES OF EVIDENCE.

6. What do you think of how the courts are presently structured and organised?

e.g. number of courts and distribution, hierarchical structure, jurisdictions, etc.

7. What do you think of the court procedures; can they be understood by everyone?

What is your opinion about the manner in which evidence is presented in court?

Do these present problems for the parties during the proceedings?

Please explain your answer.

How do you feel with these problems on a day-to-day basis?

8. Have there ever been cases where you have thought a difference exists between what you think is relevant evidence and what you client thinks of as relevant to the court?

If yes, why do you think this occurs, and do you do anything about it?

9. Do you think the language used in court is too far removed from your clients ordinary, every day language?

How do you feel about English being used as a medium of communication in some of the courts?

When you see an accused standing in the dock what impression do you get of whether or not he can understand what is being said?

Do they look puzzled, do they ask questions, do you have to give explanations.

PERSONNEL AND TRAINING

10. Do magistrates and court presidents need legal training?

Lawyers, assessors?

How much of such training is needed? Please indicate.

A lot

A fair amount

Not very much/not at all

11. How important do you think is the role of assessors and lawyers in court?

Why do you say that?

12. What do you think are the most important qualities in a good magistrate, court president, judicial commissioner?

GENERAL IMPRESSIONS ABOUT COURTS.

13. Do you think the courts are the best way of dealing with the sort of disputes normally brought to you?
Would you like to see some matters or cases removed from the courts and dealt with elsewhere?

If yes please explain.

14. It has been argued (e.g. by some academics) that defendants in criminal cases face difficulties in obtaining legal help.

Would you agree or disagree with this statement?

What sort of difficulties do you think they experience?

If so, how do you think such problems can be solved?

QUESTIONS FOR CHANGE.

15. Have you suggestions for change in the courts, any

improvements you would like to see made in the nature of the proceedings?

e.g. structure and organisation, personnel, training, legal formality, evidence and procedures?

Why is that?

INTERVIEW SCHEDULE FOR DISPUTING PARTIES:

ACCUSED PERSONS AND INJURED PARTIES.

CONFIDENTIAL:

CATEGORY OF RESPONDENT:

COURT :

AREA :

OPENING QUESTIONS.

1. Have you appeared before a court of law before?
If yes, please explain in what capacity, in which court.
2. Why did your case go to trial?
What were you expecting to get?
Was there any other alternative besides deciding to go to trial?
If yes please explain.
3. Did you choose this court yourself?
If not, who did?

REPRESENTATION

4. Were you represented?
If yes, by whom? If anyone besides a relative, how did you come to know that person?
5. Before the case got to court, were you advised of what to expect in court?
If yes, who gave you the advice?

What sort of things were brought to your attention?

PHYSICAL SETTING IN COURT.

6. When you first entered the court on the day of the hearing what did you see?

Any people present, who were they, how were they positioned, manner of dress?

7. What was your first reaction?

Could you explain what you saw and how you felt?

UNDERSTANDING THE CHARGE.

8. What were you charged with?

9. Was what the crown said about the charge basically correct?

Please explain.

10. How did you plead? Please indicate.

Guilty

Not guilty

Where it is more than one charge, were any of the charges dropped, what finally were you charged with?

UNDERSTANDING THE PROCEEDINGS: PROCEDURES AND RULES OF EVIDENCE AND SATISFACTION WITH THEM.

11. What do you think about the

procedure

Manner of presenting evidence

Court setting

Were they different from what you had expected?

If yes, in what way?

12. Were you able to follow everything during the proceedings?

Is there anything you could not understand?

If yes, did you ask or request for clarification, if not, why was that?

13. Do you know who the other people participating in the proceedings were and the role of each of them?

Anyone you remember e.g. counsel, who was sitting with the judge, etc.

14. Were you able to understand what everyone said?

Your lawyer, crown counsel, clerk of court, etc.

Anyone you did not understand?

If yes, why is that?

15. What is your opinion of the counsel, including your lawyer?

16. Was all the evidence you thought valuable in your case brought up?

If not, what did you do, if nothing, why not?

What bits were left out?

Any difference between what you regarded as valuable evidence and questions asked by the counsel, etc?

UNDERSTANDING AND PERCEPTION OF OUTCOMES.

17. Were you found guilty or not guilty of the charge(s)?

How do you feel about the outcome?

Is it fair, just?

18. How do you feel about the way in which the court handled your case?

Are you satisfied? If not, why?

APPENDIX H

STATISTICS OF CASE FILED IN THE HIGH COURT : 1985/86

<u>FILED</u>	<u>1985</u>	<u>1986</u>
Criminal Appeals	111	85
Criminal Applications	329	287
Criminal Sentences	18	15
Criminal Trials	38	46
Civil Appeals	26	22
Civil Applications	403	305
Civil Trials	902	810

Source: Acting Chief Justice's Address, 2 February 1987.

NOTE

For cases disposed of and automatic reviews on decisions of the Magistrates Courts, see Ch.5.

APPENDIX I

STATISTICS OF CASES REPORTED AND
REVENUE COLLECTION (CONTRIBUTIONS)
BY LEGAL AID OFFICE
FROM 1st JANUARY TO DECEMBER

	<u>1984</u>	<u>1985</u>
<u>COURT OF APPEAL</u>		
	4	3
<u>HIGH COURT</u>		
Divorce	45	43
Judicial Separation	14	15
Compensation claims - criminal cases	4	5
<u>MAGISTRATES COURTS</u>		
Claims and maintenance (non-support)	275	257
<u>JUDICIAL COMMISSIONER</u>		
Appeals	13	19
<u>LABOUR DISPUTES AND WORKMANS' COMPENSATION</u>		
	8	7
<u>M.V.A. CLAIMS</u>		
Road Accidents	<u>59</u>	<u>107</u>
TOTAL	<u>422</u>	<u>456</u>
TOTAL REVENUE (CONTRIBUTIONS)	M3459.20	M4756

APPENDIX J

OFFICIAL DOCUMENTS

- 1877 Proclamation No. 44 of July 1 which was the original source of the 1884 Proclamation.
- 1884 The British High Commissioner's proclamation of Roman-Dutch Law as the Common Law of Lesotho.
- 1903 Earliest version of the Laws of Lerotholi, which were published and circulated for the guidance of the Chiefs' Courts with the High Commissioner's authority.
- 1928 Proposals for reforms placed before the Basutoland Council following dissatisfaction with delays in courts.
- 1935 Pim's Financial and Economic Report which finally culminated into the 1938 reforms.
- 1938 Native Administration and Native Courts Proclamations which introduced the gazettment of Chiefs and the separation of their administrative from judicial functions and began the system of Courts of Warrant (Proclamation No. 61 and No. 62).
- 1938 Proclamation No. 58, Subordinate Courts.
- 1938 Proclamation No. 57, establishing the High Court.
- 1944 Judicial Commissioner's Court Proclamation, No. 16, establishment of
- 1946 National Treasury Committee which recommended a further reduction in the members of the then

existing Chiefs' courts.

1946 The High Commissioner's Notice No. 32, Native Court Rules.

1958 Basuto Courts Proclamation, No. 23.

1961 Basuto Courts (Practice and Procedure) Rules, Government Notice No. 21.

1965 Central and Local Courts Proclamation on the recognition Constitution, powers and jurisdiction of the Courts of Warrant.

1966 The Lesotho Independence Order.

BIBLIOGRAPHY

- Abel, R.L. (1969) "Customary Laws of Wrongs in Kenya, an Essay in Research Methods", 17 American Journal of Comparative Law, PP.573-632.
- _____ (1979) "Western Courts in non western settings: patterns of Court use in Colonial and Neo-Colonial Africa", in Burman, S.B. and Harrell-Bond, B.E.(eds.), the Imposition of Law, Academic Press Inc., London.
- _____ (1981) "Conservative conflict and the Reproduction of Capitalism: The Role of Informal Justice", International Journal of Sociology of Law, 9, pp.245-267.
- _____ (ed)(1982), The Politics of Informal Justice, vols.1 and 2, Academic Press, New York.
- Abel-Smith, B. and Stevens, A. (1968) In search of Justice, Society and the Legal System, Allen Lane Penguin Press, London.
- Adams, T.F.(1980) Introduction to the Administration of Criminal Justice, Prentice-Hall Inc., New Jersey.
- African Conference on Local Courts and Customary Law (1963), Record of Proceedings of the Conference held in Dar es Salaam, 8-18 September.
- Ajulo, A.N. (1985) "Law language and international organisation in Africa: The case of Ecowas, Journal of African Law vol.29, No.1, pp.1-24.
- Allott, A.N.(1960) Essays in African Law, Butterworths,

London.

(1965) "The future of African Law" in Kuper.H. and Kuper L. (eds) African Law: Adaptation and development, University of California Press, London.

(1977) "The People as Law-makers: Custom, Practice, and Public Opinion as Sources of Law in Africa and England", Journal of African Law, vol.21, No. 1, pp.1-23.

(1984) "What is to be Done With African Customary Law? The Experience of Problems and Reforms in Anglophone Africa from 1950", Journal of African Law, Vol.28, Nos. 1 and 2, pp.56-71.

(1985) "Popular Law-Making in Western Society" in Allott, A. and Woodman, G.R. (eds) People's Law and State Law : The Bellagio Papers, Foris Publications, Dordrecht-Holland/Cinnaminson - USA.

Ashton, A. (1952) The Basuto, Oxford University Press, London

Atmore, A. (1969) "The passing of the Sotho Independence 1865-70" in Thompson, L. (ed) African Societies in Southern Africa, Heinemann, London.

Atkinson, J. and Drew P. (1979) Order in Court: The Organisation of Verbal Interaction in Judicial Settings, MacMillan, London.

Back, K.W. (1960) "The Well-Informed Informant" in Adams, N. and Preiss, J.D. (ed), Human Organisation Research: Field Relations and Techniques, Homewood, Dorsey.

Baldwin, J. and McConville, M. (1977) Negotiated Justice:

Pressure on Defendants to plead guilty, Martin Robertson: London Bankowski, Z. et al (n.d) Lay Justice in Scotland: A study of the District Courts.

Baxter, L.G. (1983) "Pure Comparative Law and Legal Science in a Mixed System", The Comparative and International Law Journal of Southern Africa, vol.xvi, pp.84-99.

Beattie, J.H.M.: (1957) "Informal Judicial Activity in Bunyoro" Journal of African Administration, vol. lx, pp.188-195.

(1964) Other Cultures : Aims, Methods and Achievements in Social Anthropology, Cohen and West, London.

Becker, H. (1970) "Problems of Inference and Proof in Participant Observation" in Denzin, N.K. (ed), Sociological Methods, A Sourcebook, Butterworths, London.

Becker, H.S. and Geer, B. (1957) "Participant Observation and Interviewing: A Comparison", Human Organisation, 16, (Spring), pp.28-32.

(1960) "Participant Observation: The Analysis of Qualitative Field Data" in Adams, N. and Preiss, J.D. (eds), Human Organisation Research : Field Relations and Techniques, Homewood, Ill. : Dorsey.

Benda-Beckmann, Von F. (1983) "Why Law Does Not Behave : Critical and Constructive Reflections on the Social Scientific Perceptions of the Social Significance

of Law" in Finkler, H. (Comp.) Proceedings of the Symposium on Folklaw and Legal Pluralism Xith IUAES Congress, Vancouver, Ottawa.

_____ (1984) "Law out of Context : A Comment on the Creation of Traditional Law Discussion", Journal of African Law, Vol.28, Nos. 1 and 2, pp.20-27.

Bennett, T.W. (1981) "Conflict of Laws - The Application of Customary Law and Common Law in Zimbabwe", International and Comparative Law Quarterly vol.30, pp.59-103.

_____ (1985) Application of Customary Law in Southern Africa, The Conflict of Personal Laws, Juta and Co. Ltd. Cape Town.

Blau, P. (1954) "Co-operation and Competition in a Bureaucracy", American Journal of Sociology 59 (May), pp.530-535.

Blumberg, A. (1967) Criminal Justice, Quadrangle, Chicago.

_____ (1970) " The Practice of Law as a Confidence Game : Organisational Cooptation of a Profession" in Niederhoffer, A. and Blumberg, A. (eds), The Ambivalent Force, Waltham, Mass.

Blumer, H. (1966) Foreword to Bruyn, S.T., The Human perspective in Sociology: The Methodology of Participant Observation, Englewood Cliffs, N.J. Prentice Hall.

Bohannon, P. (1957) Justice and Judgment Among the Tiv, Oxford University Press, London.

_____ (1963) Social Anthropology, Holt Rinehart and

Winston.

Bringer, P. (1981) "The Abiding Influence of English and French Criminal Law in one African Country: Some Remarks Regarding the Machinery of Criminal Justice in Cameroon" *Journal of African Law*, vol.25, No.1, pp.1-13.

Burgess, R.G. (1982) "The Role of Theory in Field Research" in Burgess, R.G. (ed) *Field Research: A Sourcebook and Field Manual*, George Allen and Unwin, London.

_____ (1982) "Personal Documents, Oral Histories and Life Histories" in Burgess, R.G. (ed) *op. cit.*

_____ (1982) "Keeping Field Notes" in Burgess, R.G. (ed) *op.cit.*

_____ (1982) "The Unstructured Interview as a Conversation" in Burgess, R.G. (ed) *op. cit.*

Burman, S.B. (1976) *The Justice of the Queen's Government*, Leiden/Cambridge.

_____ (1981) *Chiefdom Politics and Alien Law: Basutoland Under Cape Rule 1871-1884*, St. Antony's College, Oxford.

_____ (1985) "How the Roman - Dutch Law Became the Common Law of Lesotho", *Lesotho Law Journal* vol.1. No.1, pp.25-45.

Buxbaum, D.C. (ed) (1967) *Traditional and Modern Legal Institutions in Asia and Africa*, Brill, Leiden.

Carlen, P. (1974) "Remedial Routines for the Maintenance and Control of Magistrates' Courts", *British Journal of Law and Society* 1, pp,101-117.

- _____ (1976) *Magistrates' Justice*, Martin Robertson, London.
- _____ (1976A) "The Staging of Magistrates' Justice", *British Journal of Criminology*, 16, pp.48-55.
- Carlin, J.E. and Howard, J. (1965) "Legal Representation and Class Justice", *UCLA Law Review* 381.
- Casper, J. (1978) *Criminal Courts: The Defendant's Perspective*, National Institute of Law Enforcement and Criminal Justice, Washington, DC.
- Cavanagh, R. and Sarat, A. (1980) "Thinking About Courts : Toward and Beyond a Jurisprudence of Judicial Competence", 14 *Law and Society Review*, No. 2, pp.371-407.
- Chanock, M. (1985) *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia*, Cambridge University Press, London.
- _____ (1978) "Neo-Traditionalism and Customary Law in Malawi" *African Law Studies* 16, pp.80-91.
- Chimango, L.J. (1977) "Tradition and the Traditional Courts in Malawi", *The Comparative and International Law Journal of Southern Africa*, VOL. X, pp.39-66.
- Colson, E. (1974) *Tradition and Contract*, Aldine.
- Comaroff, J.L. and Roberts, S. (1981) *Rules and Processes : The Cultural Logic of Dispute in an African Context*, University of Chicago Press, Chicago.
- Consumer Council (1970) *Justice Out of Reach*.
- Cotran, E. (1962) "Some Recent Developments in the Tanganyika Judicial System", *Journal of African Law*, Vol 6,

pp.19-28.

- Cotran, E. (1968) *Restatement of African Law - Kenya*, Vol. 1, The Law of Marriage and Divorce, Sweet and Maxwell.
- Cratsley, J.C. (1978) "Community Courts: Offering Alternative Disputes Resolution within the Judicial System", 3 *Vermont Law Review* 1.
- Crawford, J.R. (1969) "History and Nature of the Judicial System of Botswana, Lesotho and Swaziland". *The South African Law Journal*, Vol. 86, pp.476-485.
- Danzig, R. (1973) "Towards the Creation of a Complementary, Decentralised System of Criminal Justice". 26 *Stanford Law Review* 1.
- Danzig, R. and Lowy, M.J. (1975) "Everyday Disputes and Mediation in the United States: A Reply to Professor Felstiner", 9 *Law and Society Review*, pp.675-694.
- Denzin, N.K. (1970) *The Research Act in Sociology*, Butterworths, London.
- Denzin, N.K. (ed.) (1970(a)) *Sociological Methods, A Sourcebook*, Butterworths, London.
- Duncan, P. (1966) *Sotho Laws and Customs*, Oxford University Press, Cape Town.
- Ellenberger, D.F. and MacGregor, J.C. (1912) *History of Basuto, Ancient and Modern*, Caxton Publishing Company, London.
- Elias, O.T. (1956) *The Nature of Customary Law*, Manchester University Press.

- EL-Naiem, A.A. (1978) "The Many Hats of the Sudanese Magistrate: Role Conflict in Sudanese Criminal Procedure", *Journal of African Law*, Vol.21, No. 1, pp.50-62.
- Erikson, K.T. (1967) "A Comment on Disguised Observation in Sociology" *Social Problems* 14, (Spring), pp.366-373.
- Ericson, R.V. and Baranek, P.M. (1982) *The Ordering of Justice : A Study of Accused Persons as Dependents in the Criminal Process*, University of Toronto Press, Toronto.
- Fallers, L.A. (1969) *Law Without Precedent : Legal Studies in Action in the Courts of Colonial Busoga*, Chicago University Press, Chicago.
- Feeley, M. (1973) "Two Models of the Criminal Justice System : An Organisational Perspective," *Law and Society Review*, 7, pp.407-425.
- Felstiner, W.L.F. (1974) "Influence of Social Organisation on Dispute Processing", 9 *Law and Society Review* pp.63-94.
- Fitzpatrick, P. (1980) *Law and State in Papua New Guinea*, Academic Press, London.
- _____ (1983) "Law, Plurality and Underdevelopment" in Sugarman, D. (ed), *Legality, Ideology and the State*, Academic Press, London.
- _____ (1984) "Traditionalism and Traditional Law", *Journal of African Law*, Vol. 28, No.2, pp.20-27.
- _____ (1985) "Underdevelopment and the Plurality of Law"

in Allott, A. and Woodman, G.R. (eds) *People's Law and State Law : The Bellagio Papers*, Foris Publications, Dordrecht-Holland/Cinnaminson - USA.

Forster, B. (1981) "Introduction to the History of the Administration of Justice of the Republic of Botswana", *Botswana Notes and Records*, Vol. 13, pp.89-100.

Frank, J. (1949) *Courts on Trial : Myth and Reality in American Justice*, Oxford University Press, London.

Friedland, M. (1968) "Magistrates' Courts : Functioning and Facilities", *Criminal Law Quarterly*, 11, pp.52-75.

Galanter, M. (1974) "Why the "Haves" Come Out Ahead : Speculations on the Limits of Legal Change", *Law and Society Review*, 9, pp.95-160.

(1981) "Justice in Many Rooms : Courts, Private Ordering, and Indigenous Law", *Journal of Legal Pluralism and Unofficial Law* 19, pp.1-47

(1985) "Indigenous Law and Official Law in Contemporary United States" in Allott, A. and Woodman, G.R. (eds) *People's Law and State Law : The Bellagio Papers*, Foris Publications, Dordrecht-Holland/Cinnaminson - USA.

Geer, B. (1964) "First Day in the Field" in Hammond, P.E.

(ed). *Sociologists at Work*, Basic Books, New York.

Gibbs, J.L. Jr. (1963) "The Kpelle Moot : A Therapeutic Model for Informal Settlement of Disputes in Africa", *Journal of the International African Institute*, Vol. 33, No. 1, pp.1-11.

- Gluckman, M.P.H. (1967) *The Judicial Process Among the Barotse of Northern Rhodesia*, Manchester University Press, Manchester, 2nd Edition.
- _____ (ed.) (1969) *Ideas and Procedures in African Customary Law*, Oxford University Press, London.
- _____ (1973) "Cross-examination and the substantive Law in African Traditional Courts" *Juridical Review*, pp.30-62.
- Goffman, E. (1959) *The Presentation of Self in Everyday Life*, Allen Lane, London.
- _____ (1971) *Relations in Public*, Allan Lane, London.
- Goodwin-Jones, C. (1984) *Science in Harness*, Ph.D. Thesis, Cambridge.
- Griffiths, A. (1986) "The Problem of Informal Justice : Family Dispute Processing Among the Bakwena - A Case Study", *International Journal of the Sociology of Law*, 14, pp.359-376.
- _____ (1988) "Legal Duality : Conflict or Concord in Botswana?" *Journal of African Law*, Vol. 27, No. 2, pp.150-161.
- Griffiths, J. (1979) "The Legal Integration of Minority Groups Set in the Context of Legal Pluralism", (Unpublished).
- Gulliver, P.H. (1963) *Social Control in an African Society, A Study of Arusha : Agricultural Masai of Northern Tanganyika*, Routledge and Kegan Paul, London.
- _____ (1969) "Dispute Settlement Without Courts (Tanzania)" in Nader, L. (ed.) *Law in Culture and*

Society, Aldine, Chicago.

Hailey, Lord (1953) *Native Administration in the British African Territories*, HMSO, London.

Hamnett, I. (1970) *Sotho Law and Custom in Basutoland*, Ph.D. Thesis, University of Edinburgh.

_____ (1971) "Some notes on the Concept of Custom in Lesotho", *Journal of African Law*, 266, pp.266-273.

_____ (1973) "Legal Change in Lesotho", *Rural Africana*, 22, pp.83-91.

_____ (1975) *Chieftainship and Legitimacy, An Anthropological study of Executive Law in Lesotho*, Routledge and Kegan Paul, London.

Hiemstra, V.G. (1985) *Introduction to Criminal Procedure*, 2nd Edition, Butterworth, Durban.

Hirschman, A.C. (1970) *Exit, Voice and Loyalty : Responses to Decline in Firms, Organisations and States*, Harvard University Press, Cambridge.

Hoebel, E.A. (1954) *The Law of Primitive Man*, Harvard University Press, Cambridge.

Hoffman, L.H. and Zeffertt, D.T. (1983) *South African Law of Evidence*, 3rd Edition, Butterworth, Durban.

Holleman, J.F. (1979) "Law and Anthropology : A Necessary Partnership for the Study of Legal Change in Plural Systems", *Journal of African Law*, Vol.23, No.2, pp.117-130.

Human and People's Rights in Africa and the African Charter (1985) Report of a Conference held in Nairobi, 2-4 December, Convened by the International

Commission of Jurists.

- Hund, J. (1984) "The New Legal Anthropology : A Critical Review of Rules and Processes" XVII, CILSA, pp.211-223.
- Hund, J. and Kotu-Rammopo, M. (1983) "Justice in a South African Township : The Sociology of Makgotla", Comparative and International Law Journal of Southern Africa, Vo. xvi, pp.179-208.
- Hutchison, T.W. (ed.) (1968) Africa and Law, Developing Legal Systems in African Commonwealth Nations, University of Wisconsin Press.
- Jacob, I.H. and Wheatcroft, G.S.A. (1966) "Courts and Methods of Administering Justice", in Third Commonwealth and Empire Law Conference Report.
- Jones, G.I. (1951) Basutoland Medicine Murder : A Report on the Recent Outbreak of "diretlo" murders in Basutoland, HMSO, London.
- Junod, H.P. (1966) "The Reform of Penal Systems in Africa", East African Law Journal Vol. 1 (January), PP.31-36.
- Kamenka, E. and Tay, A.E. (eds.) (1979) Justice, Edward Arnold. London.
- Keay, E.A. and Richardson, S.S. (1966) The Native and Customary Courts of Nigeria, Sweet and Maxwell, London, and African Universities Press Ltd., Lagos.
- Kingdom of Lesotho, Third Five Year Development Plan 1980-1985 (1980/81-1984/85), Government Printer, Maseru, Lesotho.

- Kolisang, G.M. (1984) The Ideal Conceptualisation of Human Rights and the Problems of Satisfying that Ideal, Paper presented at the Human Rights Workshop, University of Lesotho.
- Ladley, A. (1982) "Changing the Courts in Zimbabwe : The Customary Law Primary Courts Act", Journal of African Law, Vol.26, No.2, PP.95-114.
- Lagden, G. (1909) The Basutos, Vols. 1 and 2, Hutchison, London.
- Lamprecht, J.C. (1985) "The Future lies in the Past", Lesotho Law Journal, Vol. 1, No. 2, pp.345-355.
- Legal Services in Rural Africa (1984) Report of a seminar held at Limuru near Nairobi, 1-4 October.
- Leslie, R.D. (1969) "Lesotho's Penal System" in Milner (ed), African Penal Systems, Routledge and Kegan Paul, London.
- Lindensmith, A. (1947) Opiate Addition, Principia Press, Bloomington.
- _____ (1952) "Comment on W.S. Robinson's 'The Logical Structure of Analytic Induction'," American Sociological Review 17 (August), pp.492-493.
- Loveridge, A.J. (1969) "The Future of Native Courts", Journal of African Administration, Vol. 1. No. 1.
- Machobane, L.B.B. (1985) The Political Dilemma of the Chieftainship in Colonial Lesotho, With Reference to the Administrative and Courts Reforms of 1938, Institute of Southern African Studies Seminar Series, University of Lesotho.

- Maema, L.C. (1986) *Revival of Customary Principles in the Criminal Justice System of Lesotho*, MSc (Econ) Dissertation, University of Wales.
- Malinowski, B. (1982) "The Diary of an Anthropologist" in Burgess, R.G. (ed.) *Field Research : A Sourcebook and Field Manual*, George Allen and Unwin, London.
- Maope, K.A. (1986) *Human Rights in Botswana, Lesotho and Swaziland : A survey of the BOLESWA countries*, Monograph Series No. 1, Institute of Southern African Studies, University of Lesotho.
- Maqutu, W.C.M. (1981) "Problems of Choice of Forum in the Law of Lesotho", Mohlomi, *Journal of Southern African Historical Studies*, Vol. V, University of Lesotho, pp.121-139.
- _____ (1982) "Choice of Remedy and Forum in Lesotho, The Human Rights Dimension", in Takirambudde, P.N. (ed.). *The Individual Under African Law*, Kwaluseni, Swaziland.
- _____ (1985) "Contemporary Problems in the Family Law of Lesotho", *Lesotho Law Journal*, Vol. 1, No. 2, pp.191-216.
- McBarnet, D. (1976) "Pretrial Procedures and the Construction of Conviction," in Carlen, P. (ed.) *The Sociology of Law*, Sociological Review Monograph 23, Keele.
- _____ (1977) "Review of Defendants in the Criminal Process by A.E. Bottoms and J.D. McClean (London : Routledge and Kegan Paul, 1976)", *British Journal of Law and Society* (Winter), pp.294-298.

- _____ (1981) Conviction : Law, the State and the Construction of Justice, MacMillan, London.
- _____ (1981 (a)) "Magistrates Courts and the Ideology of Justice", British Journal of Law and Society Vol. 8, No. 2. (Winter), pp.181-195.
- McClain, W.T. (1962) "High Commission Territories" in Allott, A.N. (ed.) Judicial and Legal Systems in Africa, Butterworths, London.
- _____ (1964) "Recent Change in African Law Courts and Customary Law" Howard Law Journal, pp.187-218.
- _____ (1985) "Lesotho's Criminal Law : South African Common Law or a Lesotho Penal Code?" Lesotho Law Journal Vol. 1, No. 2, pp.235-249.
- McGillis, D. and Mullen, J. (1977) Neighbourhood Justice Centres : An Analysis of Potential Models, Dept. of Justice, Washington, DC.
- Melao Ea Lerotholi (1976), Morija : The Laws of Lerotholi, (English Version Reprinted in Duncan (1960)).
- Merry, S. (1979) "Going to Court : Strategies of Dispute Management in an American Urban Neighbourhood", 13 Law and Society Review, 891.
- Milenski, M. (1971) "Courtroom Encounters : An Observation Study of a Lower Criminal Court" 5 Law and Society Review, pp.473-538.
- Miller, R.W. (1976) Social Justice, Clarendon, Oxford.
- Mohamed, Justice, J. (1985) "The Future of Roman-Dutch Law in Southern Africa, particularly in Lesotho", Lesotho Law Journal, Vol. 1. No. 2, pp.357-364.

- Mohapeloa, J.M. (1977) Indirect Rule and Progress Towards Self-Rule and Independence : The Case of Lesotho, Paper presented at the International Conference on Southern African History, University of Lesotho.
- Mokoma, R.C. (1984/85) The Criminal Justice System of Basutoland 1868-1903 : An Interpretive Essay, submitted in fulfilment of requirements for a B.A. degree, Dept. of History, University of Lesotho.
- Moore, S.F. (1978) Law as Process : An Anthropological Approach, Routledge and Kegan Paul, London.
- _____ (1973) "Law and Social Change : The Semi-autonomous Social Field as an Appropriate Subject of Study", Law and Society Review 7, pp.718-746.
- Moshoeshe II (King of Lesotho) (1985) "Opening Address to the Workshop on the Roman-Dutch Law", Lesotho Law Journal, Vol. 1, No. 1, pp.1-23.
- Muli, F. (1982) Crime, Social Control and Social Organisation, A Historical Oriented Analysis of Crime and Social Control With Special Reference to Kenya, PhD Thesis, University of Edinburgh.
- Nader, L. (1969) "Styles of Court Procedure : To Make the Balance" in Nader, L. (ed.) Law in Culture and Society, Aldine, Chicago.
- _____ (1976) "Dispute Resolution in the Future : What are the Choices?" 61 California State Bar Journal, 281.
- Nader, L. and Singer, L. (1976) "Dispute Resolution", 51 California State Bar Journal, 281.
- Nader, L. and Todd, H.F. Jr (eds.) (1978) The Dispute - Law

in Ten Societies, Columbia University Press, New York.

- Ndaki, B.F. (1981) "What is to be said for Makgotla" in Sanders, A.J.G.M. (ed.) Southern Africa in Need of Law Reform, Butterworths.
- Nwabueze, B.O. (1963) The Machinery of Justice in Nigeria, Butterworths, London.
- Ottley, B.L. and Zorn, J.G. (1983) "Criminal Law in Papua New Guinea : Code, Custom and the Courts in Conflict", The American Journal of Comparative Law, Vol. 31, pp.251-300.
- Packer, H.L. (1968) Two Models of Criminal Process, Reprint of The Limits of Criminal Sanction, Stanford University Press, Stanford.
- Palmer, V.V. (1970) The Roman-Dutch and Sesotho Law of Delict, A.W. Sijthoff, Leiden.
- Palmer, V.V. and Poulter, S.M. (1972) Lesotho, Legal Systems of Africa Series, The Michie Company, Virginia.
- Parker, H. (1974) View From the Boys, David and Charles, New Abbot.
- Patrick, J. (1973) A Glasgow Gang Observed, Eyre-Methuen, London.
- Perelman, Ch. (1963) The Idea of Justice and the Problem of Argument, Routledge and Kegan Paul, London.
- Perry, J.A.G. (1977) "Law Codes and Brokerage in a Lesotho Village" in Hamnett, (ed.) Social Anthropology and Law, Academic Press, London.
- Perry, J. and Perry, C. (Compilers) (1975) A Chief is a Chief

by the People : Autobiography of Stimela Jason
Jingoes, Oxford University Press, London.

Pim, Sir Alan (1935) Financial and Economic Position of
Basutoland, HMSO, London.

Polsky, N. (1967) "Research Methods, Morality and Criminology"
in Hustlers, Beats, and Others, Aldine Publishing
Company, Chicago.

Poulter, S. (1969) "The Common Law in Lesotho", Journal of
African Law, Vol. XIII, (Autumn) No. 3, pp.127-144.

_____ (1970) "The Judicial System of Lesotho" The
Comparative and International Law Journal of
Southern Africa III, pp.63-79.

_____ (1972) "The Place of the Laws of Lerotholi in the
Legal System of Lesotho" African Affairs 71, No.
283, pp.144-162.

_____ (1976) Family Law and Litigation in Basotho
Society, Clarendon Press, Oxford.

_____ (1979) Legal Dualism in Lesotho, Morija, Lesotho.

Pound, R. (1910) "Law in Books and Law in Action" 44 American
Law Review, 12.

Presidential Commission Report on Criminal Justice (1967)
Blantyre, Malawi, (under Chairmanship of Chief
Justice Southworth).

Ramolefe, A.M.R. (n.d.) The Restatement of Sesotho Customary
Law : The Law of Marriage, University of London,
Restatement of African Law Project (Not Published).

_____ (1969) "Sesotho Marriage, Guardianship and the
Customary Law Heir" in Gluckman, M. (ed.) Ideas and

Procedures in African Customary Law, Oxford University Press, London.

_____ (1970) "Lesotho" in Allott, A.N. (ed.) Judicial and Legal Systems in Africa, 2nd Edition, Butterworths, London.

Rawls, J.A. (1972) Theory of Justice, Clarendon Press, London.

Read, J. (1966) "Some Legal Problems in East Africa", East African Law Journal, Vol. 21, pp.39-62.

Reiss, A. (1974) "Citizen Access to Criminal Justice", British Journal of Law and Society, 1, pp.50-74.

Report and Evidence of Commission on Native Laws and Customs of the Basuto, Saul Solomon, Cape Town (1873). Reprinted in Morija (n.d.).

Report and Proceedings of the Government Commission On Basutoland Losses (1883) W.A. Richard and Sons, Government Printers, Cape Town.

Rifkind, S.H. (1976) "Are we Asking Too Much of Our Courts?" 70 Federal Rules Decisions, 96.

Roberts, T.L. (1966) Judicial Organisation and Institutions of Contemporary West Africa : A Profile, Institute of Public Administration, New York.

Roberts, S. (1979) Order and Dispute : An Introduction to Legal Anthropology, Martin Robertson, London.

_____ (1984) "Some Notes on 'African Customary Law'" Journal of African Law, Vol. 20, No. 1, pp.1-5.

_____ (1972) "The Survival of the Traditional Tswana Courts in the Legal System of Botswana", Journal of African Law, Vol.16, No.2, pp.103-129.

- Robinson, W.S. (1951) "The Logical Structure of Analytical Induction" *American Sociological Review*, Vol.16, pp.812-818.
- Ryan, J.A. (1919) *Distributive Justice*, Macmillan Company, New York.
- Sander, E.E. (1979) "Varieties in Dispute Processing", 70 *Federal Rules Decisions* 111.
- Sanders, A.J.G.M. (1985) "The Legal Dualism in Lesotho, Botswana and Swaziland : A General Survey", *Lesotho Law Journal*, Vol. 1, No. 1, pp.47-67
- _____ (1986) "The Internal Conflict of Laws in Botswana" *Botswana Notes and Records*, Vol. 17, pp.77-88.
- Santos, De Sousa, B. (1984) "From Customary Law to Popular Justice," *Journal of African Law*, Vol.28, Nos.1 and 2, pp.90-106.
- Sarat, A. (1976) "Alternatives in Dispute Processing : Litigation in a Small Claims Court", 10 *Law and Society Review*, pp.339-375.
- Schapera, I. (1943) *Tribal Legislation Among the Tswana of the Bechuanaland Protectorate*, London.
- _____ (1943) "The Work of the Tribal Courts in Bechuanaland Protectorate" *African Studies*, 2, pp.27-40.
- _____ (1983) "Tswana Concepts of Custom and Law", *Journal of African Law*, Vol.27, No.1, pp.141-149.
- Schwartz, M. and Schwartz. C. (1955) "Problems in Participant Observation", *American Journal of Sociology*, 55 (January), pp.343-453.

- Sekese, A. (1968) *Mekhoa Le Maele a Basotho*, Morija, Lesotho.
- _____ (1980) *Pitso Ea Linonyana*, Morija Sesuto Book Depot, Lesotho (9th edition).
- Skolnick, J. (1966) *Justice Without Trial*, Wiley, New York.
- Snyder, F. (1981) "Colonialism and Legal Form : The Creation of Customary Law in Senegal", *Journal of Legal Pluralism and Unofficial Law* 19, pp.49-90.
- Starr, J. (1978) *Dispute and Settlement in Rural Turkey : An Ethnography of Law*, E.J. Brill, Leiden.
- Tennent, J.R.M. (1961) "The Administration of Criminal Law in some Kenya African Courts" *Journal of African Law*, Vol. 1, pp.139-144.
- Theal, G.M. (ed.) (1883-1964) *Basutoland Records*, Cape Town.
- Thompson, R.F. (1968) *An Approach to the Study of Customary Law*, An Address delivered by the Judicial Commissioner for Lesotho at the University of Botswana, Lesotho and Swaziland, Roma.
- Twining, W.L. (1964) *The Place of Customary Law in the National Legal System of East Africa*, Chicago.
- Van der Merwe, S.E. (1981) "Accusatorial and Inquisitorial Procedures and Restricted and Free Systems of Evidence" in Sanders, A.J.G.M. (ed.) *Southern Africa in Need of Law Reform*, Butterworths.
- Wald, P.M. and Wald, R.L. (1978) "Law and the grievances of the Poor" in Campbell, J.M. et al (eds.) *Law and Order Reconsidered*, National Commission on the Causes and Prevention of Violence, Washington.
- Wanda, B.P. (1982) "The Role of the Traditional Courts in

Malawi" in Takirambudde, P.N. (ed.) *The Individual Under African Law*, Kwaluseni, University of Swaziland.

Werbner, R.P. (1980) "The Quasi-Judicial and the Experience of the Absurd : Remaking Land Law in North-Eastern Botswana", *Journal of African Law*, Vol.24, No.1, pp.131-150.

Wirsing, R.G. (ed.) (1981) *Protection of Ethnic Minorities : Comparative Perspectives*, Oxford.

Woodman, G.R. (1983) "How State Courts Create Customary Law in Ghana and Nigeria" in Finkler, H.W. (Comp.) *Papers of the Symposia on Folklaw and Legal Pluralism*, XIth International Congress of Anthropological and Ethnological Sciences, Vancouver, Canada, August 19-23.

(1985) "Customary Law, State Courts and the Notion of Institutionalization of Norms in Ghana and Nigeria" in Allott, A. and Woodman, G.R. (eds), *People's Law and State Law : The Bellagio Papers*, Foris Publications, Dordrecht-Holland/Cinnaminson - USA.

Zander, M. (1969) "Unrepresented Defendants in the Criminal Courts" *Criminal Law Review*, pp.632-645.

Zelditch, M. Jr. (1982) "Some Methodological Problems of Field Studies" in Burgess, R.G. (ed.) *Field Research: A Sourcebook and Field Manual*, George Allen and Unwin, London.